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Nos. 07-984 and 07-990

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

COEUR ALASKA, INC., *Petitioner*,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,
Respondents.

STATE OF ALASKA, *Petitioner*,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX
Volume 2 of 2
(Pages 287a–555a)

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APPENDIX N

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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RECORD OF DECISION
KENSINGTON GOLD PROJECT

DECISION TO BE MADE

This Record of Decision (ROD) documents the decision by the U.S. Environmental Protection Agency (EPA) Region 10 to issue a National Pollutant Discharge Elimination System (NPDES) permit for discharges from the Kensington portal to Sherman Creek, discharges of treated domestic wastewater to Lynn Canal, and discharges from the proposed tailings storage facility (TSF) to East Fork Slate Creek. This project is considered a new source discharge and, in accordance with Section 511(c)(1) of the Clean Water Act, is subject to the provisions of the National Environmental Policy Act (NEPA).

The ROD is issued pursuant to NEPA (42 U.S.C. §4321 et seq.), the Council of Environmental Quality (CEQ) NEPA regulations (40 CFR Parts 1500-1508), and EPA's NEPA implementing regulations (40 CFR Part 6, Subpart F). EPA participated in the development of the Kensington Gold Project Final Supplemental Environmental Impact Statement

(FSEIS) as a cooperating agency, with the U.S. Forest Service (USFS) as the lead agency. EPA's decision to issue an NPDES permit is based upon the analysis in the FSEIS as supplemented by the U.S. Army Corps of Engineers (USACE) Clean Water Act 404(b)(1) analysis, which identified alternative D as the least environmentally damaging practicable alternative. The Notice of Availability of the FSEIS was published in the Federal Register by the USFS on December 23, 2004. EPA issued the draft NPDES permit on June 21, 2004 for a 45-day comment period. Public hearings were held in Juneau, Alaska on July 26, 2004 and in Haines, Alaska on July 27, 2004. EPA's response to comments on the draft NPDES permit is included in Appendix A.

INTRODUCTION

The Kensington Gold Project is an underground gold mine located approximately 45 miles north-northwest of Juneau, Alaska, in the Tongass National Forest (Figure 1; FSEIS Figure 1-1). The Kensington project has undergone three iterations of environmental review and was previously permitted in 1998. In 1990, the Kensington Venture (a joint venture between Coeur Alaska, Inc. [Coeur] and Echo Bay Exploration) first submitted plans to develop the mine to the USFS. The USFS completed the Final Environmental Impact Statement (FEIS) in 1992. The 1990 plan included underground mining to recover the ore, processing the ore via flotation, cyanidation, gold refining, and disposal of the tailings in a tailings impoundment built in the Sherman Creek drainage. The impoundment would have been sized to accommodate 30 million tons of tailings. The proposal included discharging wastewater to Lynn Canal following treatment, and shuttling employees

to the mine site using helicopters. The operation would have used liquefied petroleum gas to fuel on-site generators. A marine terminal developed at Comet Beach in Lynn Canal would have handled supply deliveries and gold shipments. The Kensington Venture never obtained all the permits necessary to build the mine, and in 1995 Coeur became the sole stakeholder in the property. Coeur then, in 1995, submitted an amended plan of operations to the USFS. In June 1996 Coeur revised the 1995 plan in response to issues raised during scoping.

The 1996 amended plan, included removal of the cyanide circuit and off-site processing of the flotation concentrate, backfilling a portion of the tailings in the mine, and disposal of the remaining tailings in a 20 million ton dry tailings facility (DTF) constructed between Sherman and Sweeny creeks. Coeur's proposal also included using diesel instead of liquefied petroleum gas to fuel generators, and discharging mine water to Sherman Creek and DTF effluent to Camp Creek. The 1996 plan was analyzed in the Final Supplemental EIS and approved by the USFS in a ROD signed in August 1997. Coeur obtained all permits necessary for construction from federal, state, and local authorities, including an NPDES permit from EPA, issued on May 14, 1998 (Permit No. AK-005057-1). The permit authorized discharge of drainage from the Kensington portal, which is treated and discharged to Sherman Creek. It also authorized the discharge from the permitted DTF to Camp Creek and domestic wastewater discharge to Lynn Canal.

In November 2001, Coeur submitted another amendment to the plan of operations to the USFS. This plan, which initiated a second supplemental en-

vironmental impact statement, proposed a number of changes to the approved plan, including changing the location of the processing facilities, tailings disposal, and site access and employing a different means of transportation. The operation would also mine a smaller portion of the ore body containing higher average gold concentrations. This amendment also proposes to use a dock to be built at Cascade Point on property held by Goldbelt Incorporated, an Alaska Native corporation. The 2001 amended plan formed the basis for Alternative B for the December 2004 FSEIS. The USFS selected Alternative D in a ROD signed on December 9, 2004. Coeur revised its plan of operations to conform to Alternative D in May 2005. The USFS approved the plan of operations in June 2005.

The purpose of the proposed action is to consider changes to the previously permitted project. The changes were intended to improve efficiency and reduce the area of surface disturbance associated with the 1997 mining plan and to provide more reliable transportation and access by improving worker safety during transit to the site and eliminating shipping delays related to weather and sea conditions at Comet Beach. The improved reliability of access would allow Coeur to reduce the amount of diesel storage, as well as inventories of materials and supplies. Tailings disposal would require a smaller area of surface disturbance under the proposed action compared to the 1997 plan by utilizing a 20-acre lake for tailings storage (Lower Slate Lake).

The U.S. Forest Service was the lead agency for preparation of the Kensington Gold Project Final Supplemental EIS. EPA, the U.S. Army Corps of Engineers, and the State of Alaska Department of

Natural Resources (ADNR) were cooperating agencies because of the federal and state authorizations and approvals required for this project. EPA was a cooperating agency because of a decision regarding NPDES permit issuance. In accordance with NEPA, the FSEIS was prepared to reduce duplication, excessive paperwork and delay, and to address federal and state regulatory requirements. Through EPA's participation as a cooperating agency, we have determined that the FSEIS adequately describes the potential direct, indirect, and cumulative effects associated with the Kensington Mine Project.

Sections 301 and 306 of the Clean Water Act (CWA) require that EPA develop wastewater effluent standards for specific industries, including gold mines. These standards are established for both existing sources and "new sources". Because this project would be a new source, the New Source Performance Standards (NSPS) for gold mines and mills are applicable to the project (40 CFR 440.104). NPDES permit limits and requirements are established to ensure compliance with the NSPS and state water quality standards. The NSPS include effluent limits applicable to discharges of mine drainage; they also prohibit the discharge of process water (including mine tailings). An exception is provided for excess flows associated with net precipitation and/or co-mingled mine water where discharge of such flow is subject to the comparable effluent limits for mine drainage. In states that have not been delegated NPDES permitting authority, such as Alaska, EPA is authorized to permit point source discharges of effluent, including process wastewater and stormwater. Where EPA is the permitting agency, the regulations provide that issuance of a new source NPDES is sub-

ject to the environmental review requirements of NEPA.

The 5-year NPDES permit issued by EPA for the 1998 project expired on May 14, 2003, but was administratively extended until a new permit is issued because Coeur submitted a timely application in October 2002. Couer submitted a revised application for an NPDES permit on March 16, 2004. The final NPDES application submittal, consistent with the proposed project revisions, was made on June 15, 2004. The application addresses the current discharge to Sherman Creek, treated domestic wastewater discharge during construction, and the proposed discharge from the tailings storage facility (TSF) in Lower Slate Lake.

PROPOSED MINING OPERATION

The Kensington ore body extends from the surface to a depth of approximately 3,000 feet and is irregular in both shape and distribution of gold. After a two-year construction period, mining would be accomplished over a projected period of 10 years using a long hole, open stoping method. Ore would be mined at a rate of 2,000 tons per day targeting high-grade gold ore. Ore would be hauled by truck to the mill site located near the Jualin mining area. After crushing, the ore would be transferred to a grinding circuit. Following grinding, oversized material would be returned to the head of the grinding operation, while undersized material would be separated into coarse and fine materials using centrifugal cyclones. From the cyclones, heavy material would go to a gravity concentrator and light material would go to a conditioning tank that feeds a flotation circuit. Concentrate from the gravity concentrator and the flotation circuit would be dewatered, and approxi-

mately 700 tons per week of concentrate would be transported from the site. From 2,000 tons of ore per day, mining and processing would produce approximately 400 tons of waste rock per day and approximately 7.5 million tons of tailings over the lifetime of the proposed project.

Waste rock would be disposed in two disposal areas near the Kensington portal and near the Jualin mine area. Tailings would be separated into coarse and fine fractions. The coarse tailings would be pumped to the mine areas that need backfill. At least 40% of the tailings would be backfilled. The fine fractions would be disposed in the tailings storage facility.

Mine drainage is currently combined with runoff from waste rock piles and other disturbed areas and discharged to Sherman Creek through Outfall 001, pursuant to the 1998 NPDES permit. Underground workings that produce mine drainage, as well as waste rock, were developed as part of exploration activities and will be expanded as active mining operations are initiated. Water from mine dewatering operations will continue to be collected, clarified, and filtered underground, if necessary, and then pumped to an above ground mine water treatment facility. Although the revised proposal includes access to the workings by tunnels from both the Kensington and Jualin sides of the property, all mine drainage would be collected and routed to Outfall 001.

Tailings slurry from the mill would flow through a 3.5 mile pipeline to the TSF, which would be formed by the natural lake basin of Lower Slate Lake and a dam constructed at the outlet of the lake. The darn would be a concrete-faced rockfill dam con-

structed in two phases. The TSF would be designed to hold 4.5 million tons of tailings. Mid-lake East Fork Slate Creek would be diverted around the TSF. Creek water would be removed from behind a constructed berm through a 20-inch diversion pipeline. The TSF will receive water from slurry transport of tailings as well as undiverted natural inflows from drainage areas immediately adjacent to the TSF and overflows from the berm. Water will be recycled from the TSF to the mill at a rate of approximately 100 gallons per minute (gpm). The discharge from the TSF (Outfall 002) will be treated via reverse osmosis then combined with the diverted natural flows and pumped into the East Fork Slate Creek drainage below the TSF.

DESCRIPTION OF PROJECT ALTERNATIVES

NEPA requires that agencies consider alternatives to the proposed action that address the significant issues identified during the scoping process. NEPA also requires that the alternatives analysis include a No Action Alternative. Because the FSEIS is a supplement to a NEPA analysis that resulted in a permitted project (the 1997 mining plan), the No Action Alternative in this case represents no changes to the approved project. The FSEIS also includes an alternative (Alternative Al) that reflects a mining scenario that could occur if the No Action Alternative was selected, i.e., the operator could choose to lower the production rate and pursue a smaller portion of "high-grade" gold ore similar to what is proposed in the proposed action. The following discussion and Table 1 provides a summary of the No Action Alternative (Alternative A), reduced mining rate of the No Action Alternative (A1), and three action alternatives (Alternatives B, C, and D).

Section 2 of the 2004 FSEIS provides detailed descriptions of each of the following alternatives for the Kensington Gold Project.

Alternative A – No Action

The No Action Alternative functions as the baseline against which the effects of other alternatives are compared. As noted above, the No Action Alternative represents a previous action, which in this case is the 1997 mining plan that received agency approval and authorizations in 1998. Alternative A corresponds to the 1997 SEIS Alternative D. Alternative A includes mining the entire ore body and underground crushing of ore with aboveground grinding and flotation. Flotation concentrate would be shipped to a processing facility off-site. There would be no on-site cyanidation circuit. Employees would be housed on-site and transported by helicopter for weekly rotations. Supplies, including fuel, would be delivered to a marine terminal constructed on Comet Beach. Approximately 25% of the tailings would be backfilled. The rest of the tailings would be dewatered before being placed in the DTF. The DTF would have the design capacity to hold 20 million tons of tailings and would include an engineered berm around each cell of the facility. Wastewater from tailings dewatering would be treated and discharged to Sherman Creek. The production rate would be 4,000 tons of ore per day and 400 tons of waste rock per day. The waste rock would be used in the construction of the DTF. Road and DTF construction would require the development of sand and gravel and till borrow areas.

Alternative A1 – Reduced Mining Rate, DTF

Alternative A1 reflects a mining plan similar to that described for Alternative A but uses the same

mining rate and tailings production levels consistent with Alternatives B, C, and D (2,000 tons per day and 7.5 million tons total, respectively).

Alternative Al would result in 4.5 million tons of tailings being placed in the DTF, assuming that 40 percent of the tailings would be haat-died. The DTF would be approximately 65 percent smaller than it would be under Alternative A. The reduced mining rate presented under Alternative A1 would produce very limited amounts of waste rock. Because waste rock would not be available for use in DTF construction under this alternative, the impact analysis assumes the same number of acres of sand and gravel borrow areas would be required as under Alternative A, although the coarse and fine till borrow areas would be reduced in size. Other aspects of Alternative A1, including wastewater management and transportation of employees and materials, would be the same as those described under Alternative A.

Alternative B – Coeur's Proposed Action

Alternative B reflects a number of changes to the mine plan compared to the No Action Alternative. These changes include construction of a TSF in Lower Slate Lake for tailings disposal instead of the dry tailings facility, relocating milling operations to the Johnson Creek drainage, and eliminating the personnel camp. The operation would mine a smaller amount of ore with a higher average gold concentration compared with that proposed under Alternative A. The production rate would be approximately 2,000 tons of ore per day. Alternative B would include the development of a tunnel connecting the Kensington and Jualin areas of the mine. Access to the site would be from marine terminals built in Slate Creek Cove and at Cascade Point (Figure 2; FSEIS Figure

1-2). A daily shuttle boat service would transport employees to and from the project site. The TSF would be sized to accommodate the disposal of 4.5 million tons of tailings (Figure 3; FSEIS Figure 2-6), while approximately 3.0 million tons of tailings would be used as backfill in the mine. Borrow areas would be developed for construction of the TSF dam and roads. This alternative includes recycling water from the TSF to the mill circuit. Alternative B would require upgrading the 5-mile-long access road and constructing a 3.5-mile pipeline access road and a 1-mile cutoff road connecting the other two roads.

Alternative C – Dock Location and Design/ Diversion

Alternative C is the same as Alternative B except it includes surface water diversions around the TSF and a marine terminal at Echo Cove instead of Cascade Point. The dock in Echo Cove would be located approximately 0.75 mile north of the existing Echo Cove boat ramp (Figure 2; FSEIS Figure 1-2). Mine workers would use this dock to reach the shuttle boat that would transport them to the dock at Slate Creek Cove. The landing craft ramp at the Slate Creek Cove marine terminal would be eliminated, minimizing the amount of fill placed in the intertidal zone. Alternative C would not include recycling water from the TSF and the mill circuit. This alternative would include diversion channels to direct the flow from Mid-Lake East Fork Slate Creek and overland runoff from undisturbed areas around the TSF (Figure 4; FSEIS Figure 2-9). The diversion would discharge to a spillway at the top of the TSF dam. The diversion would require a dam on Upper Slate Lake to maintain water levels sufficient to reach the spillway at the TSF dam. The purpose of the diversion would be

to minimize the volume of fresh water in contact with the tailings.

Alternative D – Modified TSF Design and Water Treatment

Alternative D was developed to address concerns about the TSF effluent meeting NPDES permit limits for protection of downstream water quality in East Fork Slate Creek below the TSF. Alternative D is the same as Alternative B, except it also includes diversion of stormwater and surface water around the TSF, TSF outfall water treatment, and a tailings cap at closure. Alternative D includes a dam in Mid-Lake East Fork Slate Creek that would gravity-feed a pipeline diversion around the TSF (Figure 5; FSEIS Figure 2-12). Water would be treated prior to discharge from the TSF via a reverse osmosis treatment system, which would provide solids and metals removal to ensure compliance with permit limits. Effluent from the treatment system would discharge to the diversion pipeline. Alternative D also requires a cap over the tailings at closure unless the operator could demonstrate to the USFS, USACE, ADNR, and EPA that the tailings are not toxic.

Environmentally Preferable Alternative

The environmentally preferable alternative "ordinarily, means the alternative that causes the least damage to the biological and physical environment; it also means the alternative which best protects, preserves, and enhances historic, cultural, and natural resources" (CEQ, 1981: Forty Most Asked Questions, no. 6a).

On December 1, 2004, at the request of the U.S. Forest Service, EPA submitted its designation of an

environmentally preferable alternative for inclusion in the FSEIS. EPA's selection of an environmentally preferable alternative was based on the record at the time, which lacked two important elements. First, the record lacked a completed ESA analysis by the National Marine Fisheries Service (NMFS) addressing potential impacts to listed species and designated critical habitat in Berners Bay. Second, the record lacked a completed Clean Water Act (CWA) § 404(b)(1) analysis from the U.S. Army Corps of Engineers, which must determine the least environmentally damaging practicable alternative and address significant degradation.

Based on information available at the time and on EPA's comparative analysis of the alternatives, EPA concluded that Alternative A is the Environmentally Preferable Alternative. Alternative A is the only alternative that avoids the habitat loss and the loss of natural ecological functions in Lower Slate Lake during mine operations. Alternative A also avoids impacts to critical habitat and resources in Berners Bay that would result from dock construction, operation, and vessel activities. The USFS and the ADNR identified both Alternatives A and D as environmentally preferable.

Since that time; NMFS has issued a Biological Opinion (BO) and the Corps of Engineers has issued CWA 404 permits for the project. In the BO, issued on March 18, 2005, NMFS stated that individual Stellar sea lions and humpback whales within the action are may be adversely impacted. However, the BO concluded that Alternative D, as proposed, is not likely to jeopardize the continued existence of listed species, or destroy or adversely modify designated critical habitat found in proximity to the action area.

NMFS maintained its earlier recommendation to use an alternative dock location to Cascade Point, preferably outside Berners Bay, to facilitate transportation of crews to the mine. The BO also included a list of conservation recommendations to minimize adverse effects to the listed species.

The Corps of Engineers CWA 404(b)(1) analysis, issued with the Record of Decision and CWA 404 permit, on June 17, 2005, concluded that Alternative D is the least environmentally damaging alternative based on acreages of wetland impacts. The Corps also concluded that Alternative D is economically more attractive than the previously permitted project.

The USFS selected Alternative D and approved the modifications to the 1997 Approved Plan of Operations in its Record of Decision (December 2005). The State of Alaska has also issued its decisions, authorizations, and certifications for Alternative D.

However, for the reasons discussed in our December 1, 2004 letter, EPA continues to believe that Alternative A is environmentally preferable.

EPA DECISION

EPA's decision regarding the Kensington Gold Project involves the issuance of an NPDES permit based on Coeur's NPDES permit application, which reflects Alternative D. The permit sets conditions on the discharges of pollutants from the mine to Sherman Creek (Outfall 001), from the TSF to East Fork Slate Creek (Outfall 002), and domestic wastewater to Lynn Canal (Outfall 003).

Outfall 001 represents the discharge from settling facilities that collect treated (metals precipitation and filtration) mine drainage from

mine dewatering operations and runoff from waste rock piles and other disturbed areas in the Sherman Creek drainage. Outfall 002 will discharge water from the TSF, which includes the natural lake basin of Lower Slate Lake and a constructed retention embankment at the outlet of the lake. Outfall 003 will discharge treated domestic wastewater for the Kensington Mine camp during construction. No permanent camp is proposed to remain at the site during the operation phase of the project. The NPDES permit includes effluent limitations specific to each outfall and other requirements to ensure water quality protection in each of the water bodies mentioned above, including compliance with the Alaska Water Quality Standards (AWQS) for aquatic life and human health.

EPA made the draft NPDES permit and Fact Sheet available for a 45-day public review period on June 21, 2004. The draft permit contained effluent and receiving water (ambient) monitoring requirements as well as requirements that the permittee develop a Best Management Practices program for the control of toxic and hazardous pollutants.

The final permit and response to comments are included in this ROD in Appendix A.

FACTORS CONSIDERED IN THE DECISION

Scope of EPA's Clean Water Act § 402 Authority

EPA's NPDES permitting authority is limited to issuing permits based on NPDES permit applications we receive, so long as it is feasible for the project, as described in the application, to meet water-quality based limits. Coeur applied for an NPDES permit to discharge wastewater based on Alternative D. Coeur has gained approval to begin construction and opera-

tion of the Kensington Mine Project from the USFS, the USACE, and the State of Alaska, whose consent or authorization is necessary. Coeur has demonstrated their ability to implement treatment options (such as reverse osmosis for outfall 002) that will enable them to meet permit limits.

Receiving Waters

The permit authorizes discharges through three outfalls. Outfall 001 discharges mine water to Sherman Creek, and is located at latitude 58° 52' 04" North and longitude 135° 06' 55" West. Outfall 002 will discharge from the TSF to East Fork Slate Creek at latitude 58° 49' 58" North and longitude 134° 57' 58" West. Outfall 003 will discharge treated domestic wastewater to Lynn Canal at latitude 58° 51' 58" North and longitude 135° 8' 28" West.

East Fork Slate Creek and Sherman Creek are designated by the State as protected for water supply (drinking, culinary, and food processing; agricultural irrigation and stock watering; aquaculture; and industrial); contact and secondary recreation; and growth and propagation of fish, shellfish, other aquatic life, and wildlife (18 ACC 70.020(2)). Lynn Canal is protected for marine water supply (aquaculture, seafood processing and industrial); water recreation (contact and secondary); growth and propagation of fish, shellfish, other aquatic life, and wildlife; and harvesting for consumption of raw mollusks or other raw aquatic life.

Description of Discharges

Outfall 001

Outfall 001 represents the discharge from settling facilities into Sherman Creek. Inflows to the sediment ponds include treated mine drainage from

mine dewatering operations and runoff from waste rock piles and other disturbed areas in the Sherman Creek drainage. The sediment pond has two cells. Stormwater runoff from waste rock and disturbed areas is routed to Cell 1 via a riprap lined spillway, which is sized to handle runoff from a 100-year, 24-hour precipitation event. A spillway, notched in the center berm, allows flow from Cell 1 to Cell 2. Cell 2, which is designed to treat water from mine dewatering operations and high flows from Cell 1, has been conservatively designed to hold settled solids for the life of the mine. Discharge from Cell 2 to Outfall 001 occurs through a perforated decant pipe with a design capacity to handle the 10-year, 24-hour storm event. Discharge flows from Outfall 001 will initially increase due to increased mine development area and will vary over time due to stormwater runoff.

Coeur estimates the rate of mine dewatering to generally range from 1.33 and 2.45 cubic foot per second (cfs). All of the flow will be collected in sumps within the mine where initial settling will occur. Mine drainage will be pumped to the mine water treatment system for metals precipitation and filtration. Settled solids will be added to tailings that are backfilled into the mine. Filter backwash will be recycled to the underground mine water treatment system.

Outfall 002

Outfall 002 will discharge water from the TSF to East Fork Slate Creek. The natural lake basin of Lower Slate Lake and a constructed retention embankment at the outlet of the lake will form the TSF. TSF inflows include tailings slurry from mill operations, precipitation that falls onto the lake, storm water runoff from upland areas adjacent to the TSF,

and flows from Mid-Lake East Fork Slate Creek (if the flows are too high for the diversion to accommodate). The upstream flow in East Fork Slate Creek will be collected and transferred to a 20-inch diversion pipeline.

Tailings slurry will flow by gravity from the mill to the TSF in a 3.5-mile pipeline. The pipeline will be double-walled high density polyethylene (HDPE) and/or steel. The tailings slurry will be discharged into the TSF through perforations in a submerged portion of the tailing delivery pipeline. The pipeline will be operated so that a portion of the perforated segment is always above the bottom of the TSF, allowing the tailings to flow freely from the pipe.

The average slurry throughput to the TSF is projected to be 354 gpm with an average solids content of 55 percent by weight (i.e., the water component of the slurry will be approximately 247 gpm). A portion of the slurry water will be entrained in the tailings and will be unavailable for recycle. Coeur will recycle an average of 100 gpm out of the TSF back to the mill.

Coeur initially proposed to discharge effluent via Outfall 002 without treatment other than best management practices (BMPs) to enhance settling. However, water quality modeling indicated that total suspended solids (TSS) limits may not be achieved without additional treatment. In addition, background levels of aluminum in East Fork Slate Creek and Lower Slate Lake occasionally exceed the permit limits. As a result, Coeur amended its NPDES permit application to incorporate a reverse osmosis (RO) treatment system into the TSF design. The RO system will reduce levels of both aluminum and TSS to below permit limits and provide additional removal

of other pollutants. A maximum total of 1,100 gpm is authorized to be discharged out of Outfall 002.

Outfall 003

The discharge of treated domestic wastewater for the Kensington Mine camp was previously permitted for use during exploration, construction and production. The current project anticipates the use of the camp through exploration and construction. No permanent camp is proposed for the site during the operation phase of the project. Domestic wastewater will be treated and discharged from Outfall 003 to Lynn Canal. The average flow for the plant during construction is estimated at 30,000 gallons per day (gpd), or 20.8 gpm, based on sizing to accommodate 300 people.

Endangered Species Act (ESA)

Section 7(a)(2) of the Endangered Species Act (ESA) requires Federal agencies to consult with the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS), as appropriate, to ensure that their actions do not jeopardize the continued existence of species listed as threatened or endangered under ESA, or destroy or adversely modify their critical habitat.

Through the NEPA process, EPA obtained a list of threatened and endangered species. On June 21, 2004, EPA sent a copy of the draft NPDES permit and Fact Sheet to NMFS and USFWS. In the Fact Sheet, EPA stated we do not expect the discharges from the facility, which comply with the requirements of the permit, to adversely affect endangered species. On November 17, 2004, the U.S. Forest Service and the U.S. Army Corps of Engineers sent a copy of the Biological Assessment/Biological Evalua-

tion (BA/BE) to NMFS and requested initiation of formal consultation. NMFS issued a final Biological Opinion (BO) on March 18, 2005. The BO did not include any specific conservation recommendation applicable to the NPDES permit issuance.

Essential Fish Habitat (EFH)

Section 305(b) of the Magnuson Stevens Fishery Conservation and Management Act of 1996 requires Federal agencies to consult with NMFS when any activity proposed to be permitted, funded, or undertaken by a federal agency may have an adverse effect on designated Essential Fish Habitat (EFH). As stated in the Fact Sheet, EPA has determined that the issuance of the permit is not likely to have an adverse effect on EFH in the vicinity of the discharge. Effluent limitations have been incorporated in the permit based on criteria considered to be protective of overall water quality in East Fork Slate Creek, Sherman Creek, and Lynn Canal.

National Historic Preservation Act (NHPA)

The USFS completed a cultural resource survey of the area of potential effect (APE) for the Kensington Gold Project in 2003, in compliance with the requirements of Section 106 of the National Historic Preservation Act (16 U.S.C. 470 et seq). The USFS sent determinations of eligibility of 43 historic sites within the APE to the State Historic Preservation Office for concurrence. Additionally, Coeur, the Alaska State Historic Preservation Office, and the Tongass National Forest entered into a Memorandum of Agreement (MOA) on November 29, 2004 to ensure compliance with Section 106 of the NHPA during mine construction, operation, and closure.

Coastal Zone Management Act (CZMA)

The State of Alaska, Office of Project Management and Permitting (OPMP), completed its review of the Kensington Gold Project for consistency with the Alaska Coastal Management Program (ACMP) on April 25, 2005. OPMP found the project, including the discharge of pollutants such as treated domestic wastewater and treated non-domestic wastewater from the Kensington Mine, to be consistent with the ACMP.

Wetlands (Executive Order 11990)

Wetlands throughout the project area would be affected by construction and operations. Section 404 of the Clean Water Act authorizes the U.S. Army Corps of Engineers to issue permits for activities that would result in the placement of dredge or fill material in waters of the U.S., including wetlands. Before a permit can be issued, Section 404(b)(1) Guidelines require that projects avoid impacts to the extent possible, minimize impacts that cannot be avoided, and provide compensatory mitigation for impacts that occur. Alternative D is estimated to impact a total of 61.7 acres of U.S. waters, including 41.5 acres of wetlands filled, 20 acres of open water filled, and 0.2 acres of marine waters filled (USACE ROD, June 17, 2005). The Corps, in their CWA 404 permit and Record of Decision, determined Alternative D was least environmentally damaging based on total wetland acreages of impact.

Floodplains (Executive Order 11988)

The Kensington Gold Project is not located within floodplains.

Environmental Justice (Executive Order 12898)

EPA's issuance of the NPDES permit will not result in disproportionate adverse human health or environmental effects to minority or low-income communities.

Tribal Consultation and Coordination (Executive Order 13175)

On January 23, 2004, EPA sent letters to Chilkat (Klukwan) Village, Chilkoot Indian Association, Douglas Indian Association, and Tlingit and Haida Central Council informing the Tribes that the preliminary permit will be sent for tribal review. EPA also invited the Tribes to initiate formal government-to-government consultation with EPA in developing the final draft permit prior to public release. EPA transmitted the preliminary draft permit and draft Fact Sheet to the Tribes on April 8, 2004. EPA received no comments in response. Each Tribe also received a copy of the draft permit and Fact Sheet at the start of the public comment period on June 21, 2004. EPA did not receive any comments from these Tribes.

MITIGATION MEASURES

Section 2.5 and Tables 2-6 and 2-7 of the FSEIS identifies potential mitigation and monitoring measures required as part of Alternative D during construction, operation, and reclamation. Additional mitigation measures have been developed as part of stipulations, special conditions, monitoring requirements of other Federal and State permits and authorizations to ensure that environmental protection is being achieved.

Alternative D also includes the construction of a reverse osmosis treatment system to treat the TSF

effluent water. The RO system would ensure compliance with permit limits for total suspended solids and metals. The treatment plant effluent would discharge into the diversion pipeline, which would flow to East Fork Slate Creek below the TSF dam.

Once tailings disposal is complete, the tailings would be capped to isolate any toxic contaminants unless Coeur could demonstrate to the satisfaction of EPA that tailings are not toxic. Although the FSEIS refers to a cover of approximately 4 inches of native material, the cap design (e.g., horizontal and vertical dimensions, types of materials, placement methods, etc.) will depend on the evaluation of the test results and the site characterization at closure.

The U.S. Army Corps of Engineers, in its CWA 404 permit, requires a special condition for Coeur to use nontoxic chemical flocculent to enhance the deposition of suspended particles and reduce turbidity levels in the Lower Slate Lake disposal site.

MONITORING

Under Section 308 of the Clean Water Act and 40 CFR 122.44(i), EPA must require a discharger to conduct monitoring whenever necessary to determine compliance with effluent limitations and assist in the development of effluent limitations. The permit contains both effluent and receiving water (ambient) monitoring requirements. The data from ambient monitoring is important for determining whether effluent limits in the proposed permit are adequate, and may be necessary for the development of water quality-based effluent limitations when the permit is reissued. The permit also requires that Coeur prepare a Quality Assurance Plan for all monitoring.

Outfall Monitoring

To ensure compliance with the effluent limitations, Coeur is required to monitor the discharges from Outfalls 001, 002, and 003 for metals, toxicity, and other parameters on a routine basis (See Permit Tables 1-4). The permit also requires that the percent removal for BOD and TSS be calculated on a quarterly basis for Outfall 003. This would entail measuring the influent as well as the effluent for these parameters.

Receiving Water (Ambient) Monitoring

The permit requires Coeur to conduct ambient monitoring in Sherman Creek, Slate Creek, and Johnson Creek.

Water Column Monitoring

The permit requires monthly water column monitoring for metals and other parameters at locations in Sherman Creek, Slate Creek, and Johnson Creek. The Sherman Creek and Slate Creek monitoring will provide data to assess the characteristics of the receiving stream below the discharges. Monitoring in Johnson Creek will be used to determine whether the process areas are affecting conditions in the creek.

Sediment Monitoring

The permit requires annual sediment monitoring for metals and other parameters and annual toxicity testing to assess the effect of mine effluent on sediments within the receiving streams. The permit requires sampling in Sherman Creek at a location immediately downstream of Outfall 001 and at another location below the fish barrier. Additional sampling is required at a location be-

low Outfall 002 in East Fork Slate Creek and in lower Slate Creek below the fish barrier. Sediment sampling is also required at a location in upper Johnson Creek immediately below the process area.

Biological Testing and Monitoring of Aquatic Resources

Benthic Invertebrates — The permit requires benthic invertebrates monitoring using methods and locations established in baseline surveys in Sherman and Sweeny creeks. In Slate and Johnson Creeks, Coeur will define reaches to be sampled that are representative of potential impacts from Outfall 002 and the process area, respectively. Each reach will be delineated for all possible sampling sites. Every third or fourth sampling site will be sampled until a total of 6 samples are collected. Sampling will be conducted once during the construction period and annually thereafter.

Resident Fish — Abundance and condition of Dolly Varden char in Sherman, Slate, and Johnson creeks will be monitored using annual snorkel observations or electrofishing techniques comparable to those employed in previous baseline studies. Surveys will be conducted in: upper, middle, and lower Sherman Creek; East Fork Slate Creek and Lower Slate Creek; and Johnson Creek. These surveys will focus on fish greater than 25 mm. Data to be derived from the surveys include: 1) population estimates by species, habitat type, and stratum, and 2) condition factor by stratum.

Anadromous Fish — Annual surveys of spawning salmon in Sherman, Slate and Johnson creeks

will be conducted to assess the size of the escapement. Surveys will consist of weekly stream counts throughout the spawning season documenting the distribution of salmon within the surveyed areas. Outmigrating juvenile pink salmon from the Sherman, Slate, and Johnson creek drainages will be sampled during the spring following each year of adult counts. Quantitative methods, such as screw trap or inclined plane trap will be used to estimate the relationship between adult escapement and fry protection.

The quality of spawning substrate used by pink salmon will be monitored to detect possible changes caused by potential introduction of fine sediments into lower Sherman, Slate, and Johnson creeks. Sediment samples will be collected in July prior to spawning activity.

Aquatic Vegetation – Annual visual surveys of visual impacts of aquatic vegetation in Sherman, Slate, and Johnson creeks will be conducted during the summer months.

RECLAMATION

Section 2.3.19 of the FSEIS discusses the general reclamation procedures for all the alternatives and summarizes how major mine components would be reclaimed. A more detailed closure and reclamation plan specific to Alternative D is presented in Appendix 1 of the Final Plan of Operations.

BEST MANAGEMENT PRACTICES (BMP) PLAN

Section 402 of the Clean Water Act and federal regulations at 40 CFR 122.44(k)(2) and (3) authorize EPA to require Best Management Practices (BMP) Plan in NPDES permits. The BMP Plan will be used

to control the discharge of toxics or hazardous pollutants by way of spillage or leaks, sludge or waste disposal, and drainage from raw material storage. The BMP Plan must be maintained at the mine facility and amended whenever there is a change in the facility or in the operation of the mine which materially increases the potential for an increased discharge of pollutants. Annually, the BMP Plan must be reviewed and certified.

PUBLIC INVOLVEMENT

The public involvement process is presented in Section 1.5 of the FSEIS. The following is a chronology of the public involvement process for the FSEIS and NPDES permitting process:

September 13, 2002	The *Notice of Intent (NOI)* was published in the Federal Register and announced the USFS' intention to develop an SEIS under NEPA for the Kensington Gold Project. The NOI initiated the 30-day public scoping period.
Sept. 19 & 21, 2002	Scoping open houses held in Juneau and Haines, respectively.
January 23, 2004	Draft SEIS released to the public for review and comment.
Feb. 24 & 26, 2004	Public meetings on the Draft SEIS were held in Juneau and Haines, respectively.
June 21, 2004	EPA, U.S. Army Corps of Engineers, and the State of Alaska issued draft permits and draft

	decisions/authorizations (draft NPDES permit, CWA 404 public notices, draft State CWA 401 certifications, draft State decisions and authorizations) for public comment.
July 26 & 27, 2004	Public hearings on draft Federal and State permits and decisions/authorizations were held in Juneau and Haines, respectively.

CONCLUSIONS

Based on the NPDES permit application received by EPA, Coeur's demonstration that the project can meet permit limits, and the findings of the FSEIS, EPA is issuing an NPDES permit, with discharge limits, for Alternative D. The permit authorizes treated mine water discharges from Outfall 001 to Sherman Creek, treated TSF discharges from Outfall 002 to East Fork Slate Creek, and treated domestic wastewater discharge during construction from Outfall 003 to Lynn Canal. The final NPDES permit is included in Appendix A.

Further information regarding this Record of Decision (ROD) may be obtained by contacting:

Hanh Shaw
NEPA Compliance Coordinator
U.S. Environmental Protection Agency
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Approving Official:

/S/ Michael F. Gearheard 6/28/2005

Michael F. Gearheard, Director
Office of Water and Watersheds

Alternative	A	A1	B (Coeur's Proposed Action)	C	D
Alternative Description	1998 permitted project	Same as A w/reduced mining rate	Recycle process water; no treatment of TSF effluent	Same as B except with no recycle	Same as B except with treatment of TSF effluent by reverse osmosis and capping of the sediment post-operation
Tailings Disposal	DTF 20 million tons; 25% backfilled	DTF 4.5 million tons; 40% backfilled	Lower Slate Lake TSF 4.5 million tons; 40% backfilled	Lower Slate Lake TSF 4.5 million tons; 40% backfilled	Lower Slate Lake TSF 4.5 million tons; 40% backfilled
Diversion	Stormwater diversion around DTF	Stormwater diversion around DTF	No diversion	Ditch diversion around TSF-would require damming of Upper Slate Lake and raising water level 20 ft. to allow gravity flow	Pipeline diversion around TSF - would require dam in Mid-lake East Fork Slate Creek
Access/Marine Facilities	On-site housing; workers transported by helicopter (12 RT per week); marine terminal at Comet Beach	Same as A	No on-site housing; daily crew shuttle between marine terminals at Cascade Point and Slate Creek Cove (4 RT per day)	Same as B except daily crew shuttle service between Echo Cove and Slate Creek Cove; no landing craft ramp at Slate Creek Cove	Same as B

DTF - drystack tailings facility
TSF - tailings storage facility
RT - round trip

This permit and the authorization to discharge shall expire at midnight, **August 31, 2010**

The permittee shall reapply for a permit reissuance on or before **March 1, 2010**, 180 days before the expiration of this permit if the permittee intends to continue operations and discharges at the facility beyond the term of this permit.

Signed this **28th** day of July 2005.

/s/Michael Gearheard

Michael Gearheard
Director, Office of Water & Watersheds
Region 10
U.S. Environmental Protection Agency

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I. LIMITATIONS AND MONITORING REQUIREMENTS

During the effective period of this permit, the Permittee is authorized to discharge pollutants from the outfalls specified herein to Sherman Creek, East Fork Slate Creek, and Lynn Canal within the limits and subject to the conditions set forth herein. This permit authorizes the discharge of only those pollutants resulting from facility processes, waste streams, and operations that have been clearly identified in the permit application process.

A. Effluent Limitations and Monitoring - Outfall 001

The permittee must limit and monitor discharges from outfall 001 as specified in Table 1, below. All figures represent maximum effluent limits unless otherwise indicated. The permittee must comply with the effluent limits in the tables at all times unless otherwise indicated, regardless of the frequency of monitoring or reporting required by other provisions of this permit.

1. Table 1

Table 1 - Outfall 011 Effluent Limitations and Monitoring Requirements

Parameter[1]	Hardness as mg/L $CaCO_3$	Units	Effluent Limitations		Monitoring Requirements		
			Max. Daily	Avg. Monthly	Sample Frequency[2]	Sample Location	Sample Type
Aluminum[3]	—	ug/L	143	71	weekly	Influent (I) /Effluent (E)	24 hr. comp.
Ammonia, Total	—	mg/l. as N	4.0	2.0	weekly	E	24 hr. comp.
Arsenic	—	ug/L	—	—	monthly	I/E	24 hr. comp.
Cadmium[3]	50≤H<100	ug/L	0.3	0.1	weekly	I/E	24 hr. comp.

Table 1 - Outfall 011 Effluent Limitations and Monitoring Requirements							
			Effluent Limitations		Monitoring Requirements		
Parameter[1]	Hardness as mg/L $CaCO_3$	Units	Max. Daily	Avg. Monthly	Sample Frequency[2]	Sample Location	Sample Type
	100≤H<200	ug/L	0.4	0.2	weekly	I/E	24 hr. comp.
	H≥200	ug/L	0.7	0.4	weekly	I/E	24 hr. comp.
Copper[3]	50≤H<100	ug/L	7.3	3.6	weekly	I/E	24 hr. comp.
	100≤H<200	ug/L	14.0	7.0	weekly	I/E	24 hr. comp.
	H≥200	ug/L	26.9	13.4	weekly	I/E	24 hr. comp.
Chromium, Total[4]	—	ug/L	—	—	weekly	I/E	24 hr. comp.
Chromium VI[4]	—	ug/L	16	8	—	I/E	24 hr. comp.
Iron	—	ug/L	1700	800	weekly	I/E	24 hr. comp.
Lead[3]	50≤H<100	ug/L	2.2	1.1	weekly	I/E	24 hr. comp.
	100≤H<200	ug/L	5.2	2.6	weekly	I/E	24 hr. comp.
	H≥200	ug/L	12.6	6.3	weekly	I/E	24 hr. comp.
Manganese	—	ug/L	—	—	weekly	I/E	24 hr. comp.
Mercury[3,5]	—	ug/L	0.02	0.01	weekly	I/E	24 hr. comp.
Nickel[3]	50≤H<100	ug/L	47.7	23.8	weekly	I/E	24 hr. comp.
	100≤H<200	ug/L	85.7	42.7	weekly	I/E	24 hr. comp.
	H≥200	ug/L	154.0	76.8	weekly	I/E	24 hr. comp.
Nitrate	—	mg/L as N	20	10	weekly	E	24 hr. comp.
Selenium[3]	—	ug/L	8.2	4.1	weekly	I/E	24 hr. comp.
Silver[3]	50≤H<100	ug/L	1.2	0.6	weekly	I/E	24 hr. comp.
	100≤H<200	ug/L	4.1	2.0	weekly	I/E	24 hr. comp.
	H≥200	ug/L	13.4	6.6	weekly	I/E	24 hr. comp.
Zinc[3]	50≤H<100	ug/L	66.6	33.2	weekly	I/E	24 hr. comp.

Table 1 - Outfall 011 Effluent Limitations and Monitoring Requirements

Parameter[1]	Hardness as mg/L $CaCO_3$	Units	Effluent Limitations		Monitoring Requirements		
			Max. Daily	Avg. Monthly	Sample Frequency[2]	Sample Location	Sample Type
	100≤H<200	ug/L	119.8	59.7	weekly	I/E	24 hr. comp.
	H≥200	ug/L	215.6	107.5	weekly	I/E	24 hr. comp.
TDS	—	mg/L	1000	1000	weekly	E	24 hr. comp.
TDS anions/ cations[6]	—	mg/L	—	—	quarterly	E	24 hr. comp.
Sulfate	—	mg/L	200	200	weekly	E	24 hr. comp.
Turbidity, effluent	—	NTU	see Permit Part I.A.5.		weekly	E	grab
Turbidity, natural condition	—	NTU	—	—	weekly	background	grab
Hardness	—	mg/L $CaCO_3$	—	—	weekly	downstream	grab
pH	—	s.u.	see Permit Part I.A.4.		Continuous	E	Recorder
TSS	—	mg/L	30	20	daily	I/E	24 hr. comp.
Flow	—	gpm	—	—	Continuous	I/E	Recorder
Temperature	—	°C	—	—	Weekly	E	grab
Dissolved Oxygen	—	mg/L	—	—	Weekly	E	grab
Chronic Whole Effluent Toxicity[7] (WET)	—	TU_c	1.6	1.1	Monthly	E	24 hr. comp.

1 - Parameters must be analyzed and reported as total recoverable unless otherwise noted.

2 - Weekly sampling shall occur on the same day of each week, unless the Permittee can document that sampling could not be performed due to extreme conditions. In such cases, a detailed explanation of the reason sampling could not be performed shall be prepared and kept with the analytical results for that day.

3 - Reporting of a maximum daily limit violation is required according to Permit Part III.G.

4 - Chromium VI (Cr VI) must be analyzed during the next sampling event when results are received showing a total chromium measure exceeding 11 ug/L - the sample holding time for chromium VI is 24 hours. Cr VI must be analyzed and reported as dissolved.

5 - Mercury must be analyzed and reported as total.

6 - This monitoring shall include a standard and complete suite of those cations and anions contributing to TDS including but not limited to boron (B), sodium (Na), potassium (K), calcium (Ca), magnesium (Mg), fluoride (F), chloride (Cl), sulfate (SO_4), total alkalinity, hardness, pH, and electrical conductivity.

7 - See Permit Part I.D. for whole effluent toxicity testing requirements.

2. Until underground activities commence, the following monitoring frequencies shall apply. These frequencies shall also apply during a long term shut down of the mine. These frequencies shall be implemented after a 6 month closure period.

TABLE 2
Monitoring Requirements for Outfall 001
(During Non-Mining Periods)

Effluent Parameter[1]	Units	Monitoring Requirement	
		Sampling Frequency	Sample Type
Aluminum	ug/L	Quarterly	Grab
Ammonia, Total	ug/L	Quarterly	Grab
Arsenic	ug/L	Quarterly	Grab
Cadmium	ug/L	Quarterly	Grab
Copper	ug/L	Quarterly	Grab
Total Chromium	ug/L	Quarterly	Grab
Iron	ug/L	Quarterly	Grab
Lead	ug/L	Quarterly	Grab
Mercury[2]	ug/L	Quarterly	Grab
Nickel	ug/L	Quarterly	Grab
Nitrate	mg/L	Quarterly	Grab
Selenium	ug/L	Quarterly	Grab
Silver	ug/L	Quarterly	Grab
Zinc	ug/L	Quarterly	Grab
Total Dissolved Solids	mg/L	Quarterly	Grab
TDS anions/cations	mg/L	Annually	Grab
Sulfate	mg/L	Quarterly	Grab
Hardness[3]	mg/L	Monthly - Instream	Grab
pH[4]	s.u.	Quarterly	Grab
Total Suspended Solids	mg/L	Daily	Grab
Flow	MGD	Continuous	Recorder
Temperature	°C	Quarterly	Grab
WET, Chronic	TU_c[5]	Annually	Grab

1 The Permittee shall conduct analysis for total recoverable and dissolved.
2 Mercury shall be analyzed as total.
3 The Permittee shall sample the receiving water hardness downstream of the discharge.
4 The Permittee shall monitor and report the number of pH excursions outside the range of 6.5 to 8.5 Standard Units.
5 Chronic toxic units (See Definitions).

3. The permittee must not discharge any floating solids, visible foam in other than trace amounts, or oily wastes that produce a sheen on the surface of the receiving water.

4. The pH must not be less than 6.5 standard units (s.u.) nor greater than 8.5 Standard units (s.u.). During continuous monitoring required in Table 1, the Permittee shall monitor the total time outside the range for the month, the length of each excursion and the number of pH excursions outside the range of 6.5 to 8.5 Standard Units (s.u.). The Permittee shall report the total time outside the range for the month as well as the number of individual excursions which exceed 60 minutes.

5. The turbidity measured in nephelometric turbidity units (NTU) must not be more than 5 NTUs above the natural condition. The natural condition sample taken from Sherman Creek must be taken upstream of the discharge point within an hour of the effluent sample.

6. The permittee must collect effluent samples from the effluent stream after the last treatment unit prior to discharge into the receiving waters.

7. Minimum Levels. For all effluent monitoring, the permittee must use analytical methods that can achieve a minimum level (ML) less than the effluent limitation, if possible. For parameters that do not have effluent limitations, the permittee must

use methods that can achieve MLs less than or equal to those specified in Table 6 (Permit Part I.E.1.).

8. Chromium VI has an average monthly effluent limit that is not quantifiable using EPA approved or approvable analytical methods. EPA will use 10 ug/L (the ML for EPA Method 218.4) as the compliance evaluation level for this parameter.

9. For purposes of reporting on the DMR, for a single sample, if a value is less than the MDL, the permittee must report "less than {numeric value of the MDL}" and if a value is less than the ML, the permittee must report "less than {numeric value of the ML)." For purposes of calculating monthly averages, zero may be assigned for values less than the MDL, the {numeric value of the MDL} may be assigned for values between the MDL and the ML. If the average value is less than the MDL, the permittee must report "less than {numeric value of the MDL}" and if the average value is less than the ML, the permittee must report "less than {numeric value of the ML}." If a value is greater than the ML, the permittee must report and use the actual value.

B. Effluent Limitations and Monitoring - Outfall 002

The permittee must limit and monitor discharges from outfall 002 as specified in the Table 3, below. All figures represent maximum effluent limits unless otherwise indicated. The permittee must comply with the effluent limits in the table at all times unless otherwise indi-

cated, regardless of the frequency of monitoring or reporting required by other provisions of this permit.

1. Table 3

Table 3 - Outfall 002 Effluent Limitations and Monitoring Requirements

Parameter[1]	Units	Effluent Limitations		Monitoring Requirements	
		Maximum Daily	Average Monthly	Sample Frequency[2]	Sample Type
Aluminum	ug/L	143	71	weekly	24 hr. comp.
Ammonia, Total	mg/L as N	3.5	1.7	weekly	Grab
Arsenic	ug/L	—	—	monthly	24 hr. comp.
Cadmium[3]	ug/L	0.2	0.1	weekly	24 hr. comp.
Copper[3]	ug/L	3.8	1.9	weekly	24 hr. comp.
Chromium, Total[4]	ug/L	—	—	weekly	24 hr. comp.
Chromium VI[3,4]	ug/L	16	8	—	24 hr. comp.
Iron	ug/L	1700	800	weekly	24 hr. comp.
Lead[3]	ug/L	0.9	0.5	weekly	24 hr. comp.
Manganese	ug/L	—	—	weekly	24 hr. comp.
Mercury[3,5]	ug/L	0.02	0.01	weekly	24 hr. comp.
Nickel[3]	ug/L	26	13	weekly	24 hr. comp.
Selenium[3]	ug/L	8.2	4.1	weekly	24 hr. comp.
Silver[3]	ug/L	0.4	0.2	weekly	24 hr. comp.
Zinc[3]	ug/L	37	18	weekly	24 hr. comp.
TDS	mg/L	500	500	weekly	24 hr. comp.
TDS anions/ cations	mg/L	—		quarterly	24 hr. comp.
Nitrates	mg/L	—		weekly	grab
Sulfates	mg/l	250	250	weekly	24 hr. comp.
Turbidity, effluent	NTU	see Permit Part 1.B.4.		weekly	grab
Turbidity, natural condition	NTU	—	—	weekly	grab
pH	s.u.	see Permit Part 1.B.3.		Continuous	Recorder
TSS	mg/L	20	30	daily	24 hr. comp.
Outfall Flow	gpm	1,100	—	Continuous	Recorder
Temperature	°C	—	—	weekly	grab
Hardness, as $CaCO_3$	mg/l	—	—	weekly	grab
Chronic Whole Effluent Toxicity[6]	TU_c	1.6	1.1	Monthly	24 hr. comp.

Table 3 - Outfall 002 Effluent Limitations and Monitoring Requirements
1 - Parameters must be analyzed and reported as total recoverable unless otherwise indicated.
2 - Weekly sampling shall occur on the same day of each week, unless the Permittee can document that sampling could not be performed due to extreme conditions. In such cases, a detailed explanation of the reason sampling could not be preformed shall be prepared and kept with the analytical results for that day.
3 - Reporting of a maximum daily limit violation is required according to Permit Part III.G.
4 - Cr VI must be analyzed during the next sampling event when results are received showing a total chromium measure exceeding 11 ug/L - the sample holding time for Cr VI is 24 hours. Cr VI must be analyzed and reported as dissolved.
5 - Mercury must be analyzed and reported as total.
6 - See Permit Part I.D. for whole effluent toxicity testing requirements.

2. The permittee must not discharge any floating solids, visible foam in other than trace amounts, or oily wastes that produce a sheen on the surface of the receiving water.

3. The pH must not be less than 6.5 standard units (s.u.) nor greater than 8.5 standard units (s.u.). The Permittee shall monitor the total time outside the range for the month, the length of each excursion and the number of pH excursions outside the range of 6.5 to 8.5 Standard Units (s.u.). The Permittee shall report the total time outside the range for the month as well as the number of individual excursions which exceed 60 minutes.

4. The turbidity measured in nephelometric turbidity units (NTU) must not be more than 5 NTUs above the natural condition. The background level for turbidity shall be measured at a point upstream of the dis-

charge point in the diversion around the TSF.

5. The permittee must collect effluent samples from the effluent stream after the last treatment unit prior to discharge into the receiving waters.

6. Minimum Levels. For all effluent monitoring, the permittee must use analytical methods that can achieve a minimum level (ML) less than the effluent limitation, if possible. For parameters that do not have effluent limitations, the permittee must use methods that can achieve MLs less than or equal to those specified in Table 6 (Permit Part I.E.1.).

7. Chromium VI has an average monthly effluent limit that is not quantifiable using EPA approved or approvable analytical methods. EPA will use 10 ug/L (the ML for EPA Method 218.4) as the compliance evaluation level for this parameter.

8. For purposes of reporting on the DMR, for a single sample, if a value is less than the MDL, the permittee must report "less than {numeric value of the MDL}" and if a value is less than the ML, the permittee must report "less than {numeric value of the ML}." For purposes of calculating monthly averages, zero may be assigned for values less than the MDL, the {numeric value of the MDL} may be assigned for values between the MDL and the ML. If the average value is less than the MDL, the permittee must

report "less than (numeric value of the may and if the average value is less than the ML, the permittee must report "less than (numeric value of the ML)." If a value is greater than the ML, the permittee must report and use the actual value.

C. Effluent Limitations and Monitoring Requirements - Outfall 003

The permittee must limit and monitor discharges from outfall 003 as specified in the Table 4, below. All figures represent maximum effluent limits unless otherwise indicated. The permittee must comply with the effluent limits in the table at all times unless otherwise indicated, regardless of the frequency of monitoring or reporting required by other provisions of this permit.

1. Table 4:

Table 4

Parameter	Units	Effluent Limitations			Monitoring Requirements	
		Maximum Daily	Avg. Monthly	Weekly Avg.	Sample Frequency	Sample Type
Flow	gpd	60,000	30,000	—	Daily	Recording
Biochemical Oxygen Demand (BOD_5)	mg/L	60	30	45	Weekly	Grab
Total Suspended Solids (TSS)	mg/L	60	30	45	Weekly	Grab
Fecal Coliform	#/100 ml	150,000	100,000	—	Weekly	Grab
Chlorine[1]	mg/L	0.02	—	—	Weekly	Grab
pH	s.u.	See Permit Part I.C.3.			Weekly	Grab

1 - Monitoring required only if chlorine is used. See Permit Part I.C.6., below.

2. The permittee must not discharge any floating solids, visible foam in other than trace amounts, or oily wastes that produce a sheen on the surface of the receiving water.

3. The pH must not be less than 6.5 standard units (s.u.) nor greater than 8.5 standard units (s.u.).

4. Influent (prior to treatment) measures of BOD_5 and TSS shall be done on a quarterly basis. From this information, percent removal shall be calculated and reported on the DMR in January, April, July, and September for the previous quarter. Percent removal shall meet or exceed 85% for both ...

APPENDIX P

DECLARATION OF JOE KAHKLEN

JOE KAHKLEN declares under penalty of perjury as follows:

1. My name is Joe Kahklen. I reside at 800 F Street, Unit D6, Juneau, Alaska, 99801. I am the Chairman of the Board of Directors of Goldbelt, Incorporated ("Goldbelt"). I am making this declaration in support of the Motion of Goldbelt to intervene as a defendant in this litigation.

2. I am a Tlingit Indian. The name Tlingit translates roughly to "the real people." My traditional name is Kokeesh, my moiety is Raven, and my clan is Dog Salmon. I was the first CEO and President of Goldbelt when it was formed in 1974, and I have been active in corporate affairs ever since.

3. Berners Bay and surrounding lands, including Cascade Point and the lands on which the Kensington Gold Project will be developed are within the aboriginal territory of the Auk Kwaan Tlingit, whose descendants are the modern day shareholders of Goldbelt.

4. Berners Bay is an important subsistence hunting and fishing area for Juneau Tlingit. Goldbelt would not be a party to any development that significantly impacted use of the area for subsistence activities. Goldbelt and its shareholders have participated in the process of assessing the environ-

mental impacts of the Kensington project - including the impacts of constructing the Cascade Point dock and transporting mine workers across Berners Bay. Goldbelt and Coeur have agreed to extraordinary mitigation measures to insure that the resources of Berners Bay will not be harmed. Significantly, the plaintiffs do not challenge the adequacy of the Supplemental Environmental Impact Statement, which concluded that with the mitigation required by the Forest Service's decision, the impacts of the project on Berners Bay will be minimal.

5. In the years since first contact with non-Native cultures, Tlingit lands, including Berners Bay, were encroached upon and wrongfully appropriated by individuals in populated areas, such as Juneau, and by the United States government for inclusion in the Tongass National Forest. The Tlingit received partial compensation for the loss of their lands as a result of a judgment issued by the United States Claims Court in 1968.

6. In 1971, Congress further addressed the issue of Alaska Native land claims by enacting the Alaska Native Claims Settlement Act ("ANCSA"), which granted some 45 million acres of land and $1 billion as compensation for the extinguishment of Native aboriginal title. In order to receive benefits under ANCSA, Alaska Natives were required to organize as corporations under Alaska law. Land entitlements were organized primarily around traditional village sites, with village corporations receiving surface estate and regional corporations the subsurface estate. Because the territory of Tlingit in the Juneau area had been subsumed into the City and Borough of Juneau, however, Tlingit in the Juneau area (along with three other communities) were -incorporated

under a separate section of ANCSA into so-called "urban corporations," with the right to select 23,040 acres of land in reasonable proximity to their municipalities. Congress expected that these lands would be selected for their economic potential, which, in Southeast Alaska at the time meant timber.

7. In 1974, the Juneau area Tlingit organized Goldbelt Incorporated, which currently has more than 3,000 shareholders. In due course the Secretary of the Interior made withdrawals of land for selection by Goldbelt, including lands on Admiralty Island within the Admiralty Island National Monument. Environmental groups, including the Sierra Club (which is a plaintiff in this litigation) immediately brought suit challenging the legality of the Admiralty Island withdrawals. To avoid the delay and expense of that litigation, in 1979 Goldbelt agreed to exchange its Admiralty Island selections for less sensitive lands on the mainland, including approximately 1,000 acres of land on and around Cascade Point on the south shore of Berners Bay.

8. The Berners Bay lands, which have high values because of their easy access from the Juneau road system, are critical to the economic future of Goldbelt and its shareholders. In recognition of this fact, the City and Borough of Juneau has designated portions of Goldbelt's lands near Cascade Point as a "new growth area," and Goldbelt, at great expense, has developed a phased plan for development of the area, beginning with dock facilities at Cascade Point. A dock at this location would have substantial value as a ferry terminus to northern Lynn Canal and the communities of Haines and Skagway, as a service site for fishing vessels, and as an embarkation point

for whale watching and other tourism activities, in addition to servicing the Kensington Mine.

9. Having, in effect, forced Goldbelt off of Admiralty Island and into Berners Bay and Cascade Point in particular, the same environmental groups, lead by the plaintiffs in this litigation, have bitterly opposed every effort of Goldbelt to realize any economic benefit from its Berners Bay lands. In 1998, these group successfully opposed Goldbelt's application for a dredge and fill permit to construct a dock at Cascade Point. The Corps of Engineers' decision was based in part on a finding that there was no demonstrated public or economic need for a dock at that time. That requirement is presently satisfied by the inclusion of the Cascade Point marine terminal in the Kensington Gold Project Plan of Operations and the need to ferry workers to the mine site.

10. In 1999, SEACC and the Sierra Club appealed a Forest Service decision authorizing construction of a right-of-way to allow administrative access to Goldbelt's lands at Cascade Point.

11. The marine terminal cannot be constructed without a conditional use permit ("CUP") from the City and Borough of Juneau ("CBJ"). SEACC strenuously opposed Goldbelt's application for a CUP. When it became clear that a permit would be granted, SEACC succeeded in having the CBJ Planning Commission and Assembly insert a condition in the CUP that the dock could be used solely to transport workers via a single ferry to the Kensington mine site. So conditioned, the CUP was granted on October 15, 2004.

12. In 2003, Goldbelt once again applied for a dredge and fill permit to construct a dock at Cascade Point to serve as a marine terminal for transporting

workers to the mine site. Although the 404 permit application was in the name of Goldbelt as the property owner, the dock is an integral part of the Kensington Gold Project Plan of Operations. The environmental impacts of the dock were considered in the Supplemental Environmental Impact Statement prepared for the Plan of Operations and associated federal permits. On July 15, 2005, the Corps issued a 404 permit for the Cascade Point marine terminal. The Corps has advised Goldbelt, however, that use of the dock for any purpose other than mine worker ferry operations, as required in Goldbelt's CUP from CBJ, may require re-noticing and amendment of the Corps' permit. Goldbelt has expended considerable time, effort and resources in pursuing a permit for a marine terminal at Cascade Point in reliance on Coeur's plans for the Kensington Mine.

13. As a consequence of SEACC's opposition, Goldbelt's proposed Cascade Point dock is a dedicated facility that is only viable if the mine goes into operation. If SEACC, the Sierra Club and Lynn Canal Conservation succeed in invalidating the Plan of Operations and blocking construction of the Kensington Mine, the practical and legal effect will be to block construction of the Cascade Point dock, as well. A recent Op-Ed piece by a representative of plaintiff Lynn Canal' Conservation (Attachment A) makes it clear that stopping the commute of mine personnel between Cascade Point and Slate Creek Cove is a principal, if indirect, aim of the litigation. SEACC has formally requested the Corps of Engineers to reconsider and deny Goldbelt's 404 permit for Cascade Point on the ground that the dock is dedicated to mine service (thanks to their efforts) and Coeur could transport workers from another site (Yankee Cove) not owned by Goldbelt. Attachment B.

14. In all its proposals for development of the Kensington mine, Coeur Alaska has shown sensitivity to the needs of the Native Community. In 1996, Coeur entered into an agreement with a consortium of Southeast Alaska Native organizations, including Goldbelt that, among other provisions, gives a bidding preference to members of the coalition in contracts for construction and servicing the mine. Because Goldbelt is the Native Corporation in closest proximity to the Kensington mine, in 2000, Goldbelt and Coeur entered into a separate agreement contemplating leases of land (including the Cascade Point dock site) and future contracting consideration, including contracting for worker transportation and ferry service across Berners Bay for commuting Coeur employees. Coeur's Plan of Operations, under challenge in this litigation, is premised on use of Cascade Point and ferry service provided by Goldbelt. Thus, the litigation threatens a direct an immediate economic impact to Goldbelt.

15. Coeur has also made commitments for local and Native training and hire. Unemployment and underemployment among Goldbelt shareholders is significantly higher than for non-Natives. Many of the jobs that are available to Goldbelt shareholders are in the seasonal tourism industry, where wages are low and fringe benefits are not customary. The Kensington mine represents the most promising new source of meaningful, well paying jobs with benefits for our shareholders.

16. To summarize, the pending litigation is just the latest in a consistent series of actions by the plaintiffs designed to prevent any and all development of Goldbelt's lands at Berners Bay. Their efforts to derail the Kensington Mine, if successful,

will not only kill Goldbelt's dock at Cascade Point, but also will deliver a crushing blow to the hopes of Goldbelt and its shareholders to benefit from the economic prosperity that the mine would bring to the community of Juneau.

17. Because of its historical roots in Berners Bay and its involvement in the permitting process, Goldbelt is in a position to provide the court with information that may not be available to other parties. Paragraph 83 of the complaint, for example, contains misleading information concerning the importance of Cascade Point as a herring spawning area. Dive surveys performed by Goldbelt and provided to the Corps of Engineers demonstrate that the small amount of herring spawning habitat that will be impacted is marginal. The Alaska Department of Fish and Game reports that Cascade Point is used infrequently for spawning. Because of the importance of the mine to Goldbelt and its shareholders, Goldbelt is also in a unique position to provide the Court with information concerning balancing of the equities.

18. No other party can adequately represent Goldbelt's interests in this litigation. The primary interest of the federal agencies and the State of Alaska is in defending the permitting process. They will not be harmed if the mine is enjoined. Coeur's principal interest is in opening and operating the mine. Transportation and housing of employees are subsidiary issues. The plaintiffs have argued that. transportation and housing could be accommodated in several ways that would not require a marine terminal at Cascade Point -- such as transportation by helicopter (Alternative A, or the "no action" Alternative favored by plaintiffs) or use of the permitted

dock facility at Yankee Cove outside Berners Bay on Lynn Canal. These alternatives are more costly, less effective to the purposes of the Plan of Operations, and involve significantly higher safety risks. Nevertheless, at some point, one of these alternatives might seem to Cocur preferable to the costs and uncertainty of protracted litigation.

DATED this 12th day of October, 2005, at Juneau, Alaska.

/s/Joe Kahklen
Joe Kahklen

APPENDIX Q

REVISED
DEPARTMENT OF THE ARMY
RECORD OF DECISON
&
PERMIT EVALUATION

APPLICANT: COEUR ALASKA, INCORPORATED and Goldbelt, Incorporated

APPLICATION NO.: POA-1990-592-M and POA-1997-245-N

WATERWAY: Lynn Canal and Berners Bay

This document constitutes the United States (U.S.) Department of the Army, Corps of Engineers' (Corps) Record of Decision (ROD), compliance determination according to the National Environmental Policy Act (NEPA), the U.S. Environmental Protection Agency's (USEPA) Section 404(b)(1) Guidelines[1] (Guidelines), and the public interest review for Coeur Alaska, Incorporated, (hereafter referred to as "Coeur"), proposed Kensington Gold Project.

The U.S. Forest Service (USFS) initiated the NEPA process to identify and analyze alternatives to the amended Mining Plan of Operation submitted to the USFS for the operation of the Kensington Gold Mine. The USFS was the lead Federal agency for the project, and the Corps was a cooperating agency to the Environmental Impact Statement (EIS) published in

[1] 40 CFR 230

February 1992, and to the Supplemental EIS (SEIS) dated August 1997. The Corps has been a cooperating agency on and throughout the current Final SEIS (FSEIS) process, which was completed in December 2004, when the USFS published the FSEIS and the USFS' ROD. Alternative D is the USFS's preferred alternative and has been adopted by Coeur.[2] The Corps authorized Alternative D, to two different permittees in separate permits (e.g., to Coeur for the Kensington Gold Project and to Goldbelt, Incorporated (hereafter referred to as 'Goldbelt") for the Cascade Point marine facility).

The aforementioned documents[3] included a complete project impact analysis and review of the direct, secondary, cumulative, and reasonably foreseeable impacts of the project as well as pertinent alternatives. These analyses have also resulted in minor changes to the proposed activities.

I have independently reviewed and evaluated the information in the EIS, the DSEIS and the FSEIS, in accordance with 40 CFR 1506.3 and 33 CFR 230.21, and have found them to be accurate assessments, and therefore appropriate for the purposes of the

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[2] The applicant had originally applied for Alternative B (described in Section VI, later in this ROD), Alternative D was not in the Draft of the FSEIS, hereafter referred to as the DSEIS, but originated later as a result of comments received from Federal, State and local agencies, as well as the land manager (USFS), with respect to the DSEIS.

[3] These documents are all available at the USFS, 8465 Old Dairy Road, Juneau, AK 99801. A copy of each was incorporated into the case file.

public interest review and alternatives analysis required by 33 CFR 320.4(b)(4) and 40 CFR 230.10. The Corps hereby adopts the FSEIS for the Kensington Gold Project, and those parts of the Kensington Gold Project EIS and SEIS not changed by the FSEIS.

I. **DECISION:** I have decided, in light of the overall public interest, to issue two Corps permits pursuant to Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403), and pursuant to Section 404 of the Clean Water Act (CWA) (33 U.S.C. 1344) (10/404 permit). One permit will be issued to Coeur to authorize the discharge of processed mine tailings into Lower Slate Lake, and the discharge of fill materials into waters of the U.S. to construct a marine dock facility at Slate Creek Cove in accordance with the attached drawings (Attachment E), Alternative D in the FSEIS and this ROD.

The second permit will be issued to Goldbelt for the Cascade Point Docking Facility. See Plans of Goldbelt, attachment A.

The Corps' ROD is based upon information contained in the EIS, DSEIS, the FSEIS and the USFS's ROD, the stated views of Federal, State, local agencies, the interested public, current national policy and applicable laws and regulations. This decision has been made in conformance with the USEPA memorandum, entitled, "Clean Water Act Regulation of Mine Tailings", dated May 17, 2004. The possible consequences of all alternatives, including the USFS's preferred alternative, have been evaluated in terms of environmental effects, social well-being, and the

public interest. All factors[4] which may be relevant to my decision were considered, including the cumulative effects thereof. These factors included, but were not limited to conservation, economics, aesthetics, general, environmental concerns, wetlands, cultural values, fish and wildlife values, flood hazards, flood plain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, mineral needs, consideration of property ownership, and in general, the needs and welfare of the people.

Turbidity, total suspended solids (TSS), aluminum, and chromium are the principal components and elements of concern within the tailing storage facility (impoundment). The tailings deposited into the impoundment will have been processed to remove sulfides and the contained gold. The ore will be crushed and ground, with the sulfides and gold mineralization removed by a floatation circuit. This would leave trace concentrations of metals bearing sulfides, metal oxides, metal sulfates, and carbonate salts. Up to 40% of the tailings will be placed back underground in a wetted cement mixture. No cyanide or arsenic will be added to the ore as a reagent to recover gold. In fact, the gold concentrate will be shipped offsite for final recovery. The water in the impoundment will not be directly discharged into

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[4] These and other factors, which were addressed in the DSEIS and FSEIS, Chapters 3 (Affected Environment) and 4 (Environmental Consequences), which adequately addressed the environmental and public Interest factors. No new factors have been identified as a result of this review.

any receiving water. The water from the tailings storage facility will be pumped by pipeline to a water treatment facility before discharge to the East Fork of Slate Creek. To ensure water quality standards for the project are met, all water from the impoundment will have to go to and through a water treatment plant during operation. The discharge from the water treatment plant is subject to an NPDES permit. To ensure that the tailings are reclaimed in accordance with approved plans, the USFS and ADNR will hold reclamation bonds on the operation to ensure that all reclamation standards are met. See Section XI, Subpart G.

Attachments to Record of Decision:

A. Plans of Goldbelt
B. Kensington Mine Section 404(b)(1) analysis.
C. List of Reference Documents
D. Revised Special Conditions for Coeur permit
E. Revised permit application tables and drawings, Coeur
F. Signed Department of the Army Permit Evaluation and Decision Documents for Goldbelt, Incorporated: (1) POA-1997-245-2 (Cascade Point Dock), and (2) POA-1997-245-M (Road from Echo Cove to Cascade Point),
G. The Section 404(b)(1) Analysis and Public Interest Review for POA 1997-245-N (Cascade Point Dock).

The documents listed in Attachment C were submitted to the Corps by the applicant and by various Federal and State agencies as supporting documents, and specified documents or portions of the listed documents have been incorporated into this ROD by reference.

II. PROPOSED PROJECT: The location and description of the proposed work was described in the Corps public notice, dated June 21, 2004. The 45-day comment period, originally commensurate with the comment period of the DSEIS, was later extended at the request of various Federal resource agencies to August 20, 2004.

Coeur's proposal is to mine gold from subsurface mineral deposits located within the Tongass National Forest on Federal and private patented lands, just north of Berners Bay, Alaska.

Coeur proposed[5] in June 2, 2004 in a revised application to place structures, and to discharge an approximate total of 5,451,700 cubic yards (cy) of fill material into an approximate total of 91.7 acres of waters of the U.S., including wetlands, in conjunction with the construction of the following new mine facilities and associated infrastructure:

Proposed Facilities	Acres of US Waters To Be Impacted	Proposed Fill Volume (cy)
Process Area	5.3	88,000
Tailing Dam	1.4	145,000
Access Road	12.0	26,000
Laydown Area	5.0	4,800
Waste Rock Disposal	4.8	311,000
Borrow Areas	4.2	0
Mine Tailings	45.5	4,800,000
Tails Placement Facilities	8.9	15,000
Topsoil Stockpile	1.0	33,000
Slate Creek Terminal	3.6	28,900
TOTAL	91.7	5,451,700

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[5] The location and description of the proposed work was described in the Corps public notice, dated June 21, 1004.

These activities included the discharge of fill material in waters of the U.S., and the placement of several structures (floats, docks and piles) in navigable waters of the U.S., in conjunction with the construction of a marine dock facility in Slate Creek Cove.

The individual components of the proposed work included the following activities: (1) the construction of building pads for milling facilities, administrative, and support facilities; (2) construction of a tailings dam; (3) construct fill pads associated with the tailings pipeline, access roads, a discharge pipe, and a pump-back sump (located at the toe of the proposed dam); (4) construction of a waste rock disposal site; (5) construction of abutments for the main access road, which would run from Slate Creek Cove to the process area, plus fills associated with the construction of various bridges (abutments, etc.); (6) construction of a staging and laydown area, as well as an infiltration gallery in Johnson Creek; (7) approximately 4,800,000 cy (or 4.5 million tons) of fill material would be discharged into approximately 45.5 acres of waters of the U.S.; (8) material and topsoil stockpiles for use in concurrent and closure reclamation activities; (9) construction of 2-foot high berms encircling settling and storage ponds; and, (10) construction of a marine dock facility in Slate Creek Cove. Galvanized metal piling would be used to anchor various floating components of the dock facility.

Coeur did not include the Cascade Point docking facility in their Department of the Army (DA) permit application. The Cascade Point docking facility application was submitted separately by Goldbelt, Incorporated, and previously evaluated as an inde-

pendent activity by the Corps in our decision document for that project. This ROD now analyzes Cascade Point as a component of the Kensington Gold Project. Two different permit decisions are being made; one for the Kensington Mine Project, and another for a docking facility at Cascade Point. We re-examined our previous conclusion that the Cascade Point facility was a separate and independent project. Based on a review of all available information including, but not limited to, the FSEIS, Goldbelt's submissions, and the City & Borough of Juneau's Conditional Use permit, we determine that, without the Kensington Mine, the Cascade Point facility would not be constructed in the foreseeable future. Although we recognize that Goldbelt intends the dock to be used for other purposes in the future, such plans are insufficient for us to evaluate it as an independent activity. We therefore conclude that a destination docking facility at Cascade Point is a component of the Kensington Mine project. It is analyzed in the FSEIS, this ROD, and in attachments F (as modified by attachment G) and G (both incorporated into this ROD).

The applicant originally applied for Alternative B, as reflected in the Corps public notice, stating that approximately 5,451,700 cubic yards of fill material would be discharged into 91.7 acres of waters of the U.S., including wetlands. The applicant later adopted the USFS's preferred Alternative D, with the volumes and acreages described in Section VI below, prior to publication of the FSEIS.

III. PURPOSE AND NEED FOR ACTION: The basic purpose is to develop a working, profitable gold mine for the Jualin/Kensington ore body. This will be accomplished by extracting the gold ore and reducing

it by removal and disposal of non-marketable components, and by transporting the gold concentrate to market. There are several transportation links and construction activities implicit in the overall mining operation.

The overall mine operation project would need the following components: (1) building pads for milling facilities, administrative and support facilities; (2) tailings disposal facilities; (3) fill pads associated with pipelines; (4) a waste rock disposal site; (5) access roads and bridge abutments; (6) staging and laydown areas; (7) an infiltration gallery; (8) material and topsoil stockpiles; (9) two marine dock facilities; and (10) berms to encircle settling and storage ponds.

Coeur's need is to relocate[6] the major mine components from the Kensington Mine site adjacent to Lynn Canal, to the Jualin Mine site location in the Johnson Creek watershed (approximately two miles to the southeast across a southern ridge extension of Lion's Head Mountain), and at Slate Cove, on the northwest side of Berners Bay. This action would allow Coeur to transport ore from the mine directly[7] to a mill on the Jualin side of the peninsula for process-

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[6] The locations of certain structures, as yet not constructed, were referenced in the previous Corps authorization. The current proposal would relocate these structures on 'paper' to new locations.

[7] The 'high-grade' ore body that would be mined is located on the eastern side of Lions Head Mountain. Thus, locating the mill on the eastern side would shorten the distance from ore body to portal to mill.

ing, from where the processed tailings material slurry would then be piped by gravity feed directly to the alpine lake disposal site (Lower Slate Lake). Coeur needs to establish a marine dock facility in Slate Creek Cove for the transport of mine personnel safely to another destination port and move gold concentrate efficiently and reliably off the mine site.

IV. SCOPE OF ANALYSIS [33 CFR 325, Appendix B, 7(b)]: When an applicant proposes to conduct a specific activity (e.g., the actions proposed by Coeur in the Corps' public notice, dated June 21, 2004), requiring authorization from the DA, and it is merely one component of a larger project (e.g., an ongoing mining operation), the District Engineer (DE) shall establish the scope of the ROD and/or permit evaluation assessment to address the impacts of the specific activity requiring Corps authorization and those portions of the entire project over which the DE has sufficient control and responsibility to warrant Federal review. Sufficient control and responsibility is considered to exist for portions of the project beyond the Corps' jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are situations where the environmental consequences of the larger project are essentially products of the Corps' permit action. (See 33 CFR 325 Appendix B, Paragraph 7.b.)

For this proposal, works initially identified as requiring Corps authorization are limited to the placement of structures, and the discharge of dredged or fill material into waters and navigable waters of the U.S.

However, the DE is considered to have control and responsibility for portions of the project beyond the limits of Corps jurisdiction where the Federal in-

volvement is sufficient to turn an essentially private action into a federal action. These are cases where the environmental consequences are essentially products of the Corps permit action. Typical factors to be considered in determining whether sufficient control and responsibility exists include (1) whether or not the regulated activity is 'merely a link' in a corridor type project; (2) whether adjacent uplands in the immediate vicinity of the regulated activity affected the locations and configuration of the regulated activity; (3) the extent to which the entire project will be within the Corps jurisdiction; and (4) the extent of cumulative Federal control and responsibility.

Combined Federal controls are influenced by the fact that the work would be conducted in part on Federally administered lands (Tongass National Forest – USFS), and in part on State of Alaska administered lands (Alaska Tidelands – marine dock facility); the water leaving the impoundment behind the dam is subject to the (USEPA) regulations (i.e., subject to the USEPA's authorization to discharge under the National Pollutant Discharge Elimination System (NPDES Permit); and other Federal laws (e.g., Endangered Species Act, Fish and Wildlife Coordination Act, the National Historic Preservation Act, the Marine Mammal Protection Act, the Coastal Zone Management Act, etc.).

There are alternatives available to the applicant, that would allow various activities of the Kensington Gold Project to function without the need for Corps authorization, e.g. use of uplands[8],[9]. Additionally,

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[8] FSEIS, Section 2.2, Overview of Project Alternatives.

logistics, technological or economic concerns, and/or other Federal or State regulatory findings could affect the practicability of some of the listed alternatives.

The scope of analysis for this action includes not only the impacts, alternatives, and project benefits resulting from the primary proposed actions (two marine docking facilities and a mine tailings disposal site) as identified above, but also the infrastructural items, e.g., the road system, pipelines, and material stockpile sites. Other project-related impacts not within the scope or a product of Corps authorization have been summarized and identified in the direct, secondary and cumulative impact analysis sections of the FSEIS.[10]

V. **BACKGROUND:** In July of 1992, the USFS approved a Plan of Operations (POO) for the Kensington Gold Project. The POO called for underground mining; ore processing with on-site cyanidation; a tailings impoundment; marine discharge of process wastewater; and various support facilities, including the use of liquefied petroleum gas for power generation. Comet Beach was the proposed landing site for all supplies and fuel. A man camp was proposed for the workers. The Corps evaluated a DA permit application for the creation of an impoundment in Sherman Creek Valley, and the disposal of mine tailings behind that dam. The Corps completed a public notice, public meetings, public

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[9] ROD, Section VI. Alternatives, below.

[10] See FSEIS, Section 4.21, Cumulative Effects.

hearings on this proposal, but never issued a DA permit for that facility.

In August 1997, the USFS approved a revised POO for the Kensington Gold Project. The modified plan called for off-site processing of a floatation derived gold concentrate; placement of tailings in a dry tailings facility accessed through a pipeline, with 25% of tailings to be paste (wetted cement mixture) backfilled in the underground workings; diesel fuel would be used for power generation; and the tailing slurry would be piped to a dewatering plant and the reclaimed water returned for reuse. Comet Beach was the proposed landing site for supplies and fuel. A camp was proposed for the workers. The Corps of Engineers received a DA permit application for this new facility design. The Corps completed a public notice, public meetings, and public hearings on this proposal. After a thorough evaluation of the project the Corps of Engineers issued a permit for the dry tailings facility and the support infrastructure.

Between the times the 1997 FSEIS evaluated the Kensington Mine Project and the revised Kensington Mine Project proposal in 2001, Coeur gained control of the Jualin Mine site and this changed the land status and gold resource calculations which resulted in a need to modify the Plan of Operation. The previous P00 sited all of the mining and milling operations on west side of Lion's Heads Mountain ridge with access and support facilities located at Comet Beach on Lynn Canal. In the 2004 FSEIS, this scenario is represented by all "A" Alternatives. The 2001 revised POO resulted in the siting of the marine dock facility, the mill, access road, and wet tailings storage facility on the east side of Lion's Heads Mountain ridge. Except for the eventual con-

nection by indirect tunneling for air flow purposes, support of waste rock disposal resulting from edit development (tunneling), and water treatment facilities located on the west side, no alternatives were contemplated or considered for a split operation, e.g. a mill operation on one side of the ridge and tailings disposal on the other. Comet Beach would still be used for support of the west side developments.

In November 2001, Coeur submitted an amendment to its approved 1998 Plan of Operations to the USFS. The amendment modified site access and eliminated the dry tailings facility in favor of placing the tailings into an impoundment in Lower Slate Lake. With the elimination of the dry tailings facility (113 acres in size), two gravel borrow areas (totaling 43 acres), which were located underneath wetlands, were also eliminated. The ore would go through a floatation circuit and the concentrate would be shipped offsite for processing. The proposal included 40% of the tailings being placed underground as a paste backfill. The mine site now includes both the Kensington and Jualin sites. Access to the-mine site would be from the Jualin side, and include a marine dock facility in Slate Creek Cove off of Berners Bay. A daily commute for the mine workers was proposed, and the man camp eliminated from the proposal. In December of 2004, the USFS finalized the Supplemental Environmental Impact Statement and issued their Record of Decision for the modified Kensington project. The DA has been a cooperating agency on the SEIS for this project and this ROD constitutes the Corps decision on the latest mine project design proposal.

VI. ALTERNATIVES CONSIDERED:

For the reasons discussed below, the Corps has concluded that alternative D with the inclusion of the water treatment plant and water diversion is the least environmentally damaging practicable alternative. The No Action Alternative (listed as Alternative A in the FSEIS) is not environmentally preferable for the reasons discussed in Section VII below. Since Alternative D has the least environmental impact, it is the environmentally preferable alternative. This section discusses two categories of alternatives. The first category is alternatives for a tailings facility with related components. The second is alternative docking destinations.

Determination of the Corps' Jurisdiction. The USFS conducted wetland and vegetation mapping of the Alternative A lands (located in the Sherman Creek and Sweeney Creek watersheds) and published the results in the 1992 EIS[11], for the Kensington Gold Project. The USFS' mapping method was the procedure outlined in the 1989 *Federal Manual for Delineating Jurisdictional Wetlands*. However, "Since that time, the 1992 Energy and Water Development Appropriations Act mandated the use of the 1987 Corps of Engineers Wetlands Delineation Manual for wetland delineations instead of the Federal Manual for Delineating Jurisdictional Wetlands (Federal Interagency Committee for Wetland Delineation, 1989). The Corps of Engineers has reevaluated the August 1990 wetland delineation performed for the Kensington Project, and as a result has determined that the wetland determinations

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11 FEIS, Chapter 3, Vegetation, pages 3-45 through 3-48.

would remain the same based on the 1987 manual."[12] The Corps conducted an onsite field visit on August 6, 1996, to verify the wetland delineation prior to giving approval.[13]

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12 FEIS, Chapter 3, Vegetation, pages 3-45 through 3-48.

13 See Corps' Memorandum dated August 12, 1996, file number POA-1990-592-D.

... safety problems, which is an unacceptable risk to workers. Also, see Section VIII of this ROD for a discussion of cost issues.

Conclusion. The Corps has considered the potential alternative destinations listed above and concluded that the proposed Cascade Point docking facility is the least environmentally damaging practicable alternative destination docking facility. Three docking facilities were considered reasonable in terms of proximity to the Slate Creek Cove dock. The Corps has determined Cascade Point, Echo Cove, and Yankee Cove to be reasonable alternative destination docking facilities in terms of proximity, because they are close enough to the north end of Berners Bay to allow for daily commuting. The other sites discussed above are more distant and would not allow for daily commuting. This is because more than a three-hour commute results in more than a 14 hour workday for the miners, and is unsafe, Reference the memorandum to the file, entitled, "Coeur Miner's Work Day", dated February 14, 2006. Use of the more distant docking facilities would therefore require construction of a residential camp near the mine site, at greater expense and environmental impact.[49] The more distant docking facilities are not practicable destinations and were not carried forward for further review. Use of Yankee Cove would result in more exposure to rough seas in Lynn Canal. The Lynn Canal route (outside Berners Bay) would be dan-

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[49] Kensington Gold Project, Corps of Engineers 404(B)(1) Practicability Analysis, Prepared by Coeur, October 2004.

gerous and unavailable for worker transport over extended winter periods. For this reason, the Corps does not consider Yankee Cove a practicable destination port. Therefore, Cascade Point and Echo Cove are the only remaining destinations that are practicable. Of these two practicable alternative destinations, Cascade Point is the least environmentally damaging, and thus is the environmentally preferable alternative. The environmental impacts of each are described above.[50]

VII. ANALYSIS OF THE LEAST ENVIRONMENTALLY DAMAGING[51] PRACTICABLE ALTERNATIVE[52]

Permanent Losses.[53] All variants of the Dry Tailings Facility would result in the permanent loss of 34 to 113 acres of aquatic habitat (special aquatic site), which consists of forested and scrub-shrub wetlands. The wetland functional values of the Dry Tailings Facility were determined to be medium for wildlife

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[50] See Attachments B (Section 404(b)(1) Analysis), and G. Also, see Section XI, later in this ROD.

[51] The majority of the wetlands to be impacted would be heavily forested, with some scrub shrub mix. Other wetlands (Wet Tailings Storage Facility) would be lake oriented (e.g., lacustrine emergent. This was discussed in the FSEIS, and summarized in the Summary of Potential Impacts of Each Alternative, under the headings of Resources, and impacts (by function and value).

[52] See 404(b)(1) Evaluation.

[53] FSEIS, Chapter 3, Section 3.12.3, and Chapter 4, Section 4.12.3.

habitat, production export and flood flow alteration, and low for riparian support. Placement of fill material into this area would reduce these wetland functions to zero. Upon final reclamation, the Dry Tailings Facility might regain some habitat value, but no wetland functions. This would not be expected to occur in the short term.

The functional value at the Dry Tailings Facility site as well as at the site of the connecting road system would cease immediately with the initial mechanical land clearing operations. The continued presence of humans and equipment would ensure that the project site was devoid of all habitat values, or 'zero-function'.[54] Once all fill material has been discharged, and after reclamation activities have been completed, and the area has been deserted by humans, other functions (e.g., wildlife habitat) would develop over time. These would be functions specific to an upland, non-forested habitat, and the conversion of wetlands to uplands would be permanent.

Under Alternatives A through A-3, additional waters, including wetlands, would not be reclaimed for all other project component areas. Some permanent loss (up to approximately 70 acres) would remain in addition to the DTF. These areas have similar functions and values to the DTF area, with some higher value areas near Sherman creek.

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[54] Zero-function is defined here as having no vegetation or water sources present, and having only bare ground and therefore providing no habitat functions such as food sources, cover from predation, nesting sites, etc., all of which is supportive of wildlife and/or fish populations.

Construction of the Wet Tailings Storage Facility would result in the permanent loss of 3.44 acres of aquatic habitat (within the footprint of the dam). This includes high value wildlife habitat.

The docking facility at Cascade Point will require permanent filling of approximately 1.3 acres of marine waters. This location has a rocky sand and gravel substrate with some fucus and kelp plant communities. It provides some herring spawning habitat. Some recolonization of this plant life is expected after placement of fill. The loss of this area is small in the context of Berners Bay and is considered a minimal loss of functions and values.

Temporary losses: The FSEIS stated that "For the purposes of this analysis, it is expected that all fish and most other aquatic life (such as macroinvertebrates, periphyton, and zooplankton) in Lower Slate Lake would be lost during operations as a result of this action. Some individuals might survive, but marginal food sources and the lack of suitable habitat as the lake elevation rises appear to be the major limiting factors."[55] Functional habitat values in the Wet Tailings Storage Facility area include high values for wildlife habitat (located primarily along the lake edge), and moderate values for fish habitat, and low values for carbon/detrital export, with low to moderate values for sediment/shoreline stabilization

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[55] See FSEIS, Section 4.9.3, page 4-38, Integrity of Freshwater Habitat.

and nutrient cycling.[56,16] The inundation of adjacent forested and scrub-shrub wetlands by the rising lake waters would reduce the wildlife habitat values of those wetlands. There will be a conversion of one aquatic habitat type (wetland) for another (open water).

Lower Slate Lake will be used as the settling pond and disposal site for the tailings generated from the mill. The mill will crush, grind, and float the sulfides out of the material. The sulfides contain the gold and will be processed off site. There will be no cyanide or arsenic added to the milling circuit. The tailings have been analyzed for the ability to generate acid drainage, and to develop metals that could become mobile. The tests described in the FSEIS App. C have shown that the tailings will not be a generator of acid or heavy metals. The tests were performed on both the tailings and the tailings decant water. The components of the tailings decant water that were identified as contaminants include aluminum, chromium, pH, and Total Suspended Solids. The tests have concluded that the pH around the discharge pipe will be toxic to the aquatic environment. This will dissipate very rapidly. The TSS will be harmful to the fish in the immediate area of the discharge. The suspended solids will be discharged to the lower depth portion of the lake. The aluminum levels from the tailings decant water will rapidly decrease to natural levels as the pH is neutralized. Aluminum will pose 4 low risk to aquatic life. This is because

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56 FSEIS, Sections 3.9 (Aquatic Resources: Freshwater), 3.11 (Wildlife), and 4.9.3 (Effects Common to Alternatives B, C, and D), and 4.11 (Wildlife).

the aluminum concentrates in the tailings is less than that in the lake sediment and the decant water levels are similar to existing concentrations in the lake. The chromium would be in a reduced form, and because of sub-aqueous disposal and the low oxygen conditions, would not be oxidized to a more toxic form. There would be a low potential for chromium to be a risk to aquatic life. Impacts to the aquatic community from physical stress are a greater risk than increased chemical concentrations. Aquatic life will die primarily from being covered with tailings and from the TSS.

The lake will recover over time. The tailings will be placed at a depth to prevent remobilization after closure from wave action. The tailings will be under water and out of the energy of wind driven waves. Post closure water concentrations of chromium and aluminum would pose a minimal risk to aquatic life. Capping of the tailings will assist in re-establishing lake bottom habitat. It is expected that the lake eventually will provide at least equivalent productivity as the current conditions of Lower Slate Lake. The reclamation of the lake will result in more emergent wetlands/vegetated shallows with moderate values for fish habitat, nutrient recycling, carbon/detrital export and sediment/toxicant retention, and high values for wildlife habitat. This functioning emergent wetland/vegetated shallows lake complex, including 15 acres of emergent wetland/vegetated shallows as part of a 62 acre lake, is more valuable to the aquatic ecosystem than a permanently filled wetland (DTF) that has lost all aquatic functions and values.

The Federal and State resource agencies have conditioned the respective permits to require habitat and

mortality monitoring activities in the Wet Tailings Storage Facility. Collected information would be used to determine the effects of the discharge of tailings on the lake habitat. The surface of the lake waters should rise, by project closure, to its maximum height above the lake's original surface, and the lake waters would eventually inundate approximately 39 acres of adjacent forested and scrub-shrub wetland habitats[57], converting these to a deepwater habitat. This would constitute a conversion of one type of water of the U.S. to another: converting adjacent forested and/or scrub-shrub wetlands to non-vegetated waters. These non-vegetated waters would convert, by either natural or artificial[58] means (active lake restoration), to emergent wetlands/ vegetated shallows (special aquatic sites). The anticipated end result would be a lake of approximately 62 acres in area (47 acres of deepwater habitat and 15 acres of emergent wetlands/vegetated shallows along the fringe). This conversion process would con-

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[57] The applicant intends to clear these land areas mechanically prior to inundation of the lake waters. Otherwise, the vegetation would inhibit movement of the raft carrying the slurry line, and preventing an even deposition of material onto the lake bottom.

[58] The Kensington Gold Project's Mining Plan of Operations contains a Reclamation Appendix, which includes the Lake Restoration Plan. The DA recognizes that this Restoration Plan is a conceptual plan, and that future revisions will be evaluated and approved as appropriate. Capping of the mine tailings in the impoundment is required by ADEC. The final reclamation plan will assure that the latest methods are used to maximize success.

tinue during and after the life of the project. The lake and its emergent fringe wetlands/vegetated shallows would provide potential fish habitat after final lake restoration had been completed and would include food sources, protection from predation, nesting capabilities, etc., whereas the lake's open waters would provide an open space for fish and other motile organisms.[59] The FSEIS concluded that after closure Lower Slate Lake could be restored to at least equivalent aquatic habitat.

For all alternatives, wetlands on which other project components (e.g., connecting roadways, borrow sites, building and material storage fill pads, etc.) will be located, all have high values for wildlife habitat, and carbon/detrital export, with moderate values for sediment and/or nutrient cycling.[60] The temporary discharge of fill into the forested and scrub-shrub wetlands for the construction and operations of these structures would result in reduced wildlife habitat values during the life of the project. However, at project closure (and completion of all required reclamation) there will be moderate to high (when fully recovered) functions for wildlife habitat in these reclaimed areas.

The proposed marine docking facility at Slate Creek Cove has low to moderate fish habitat values. The placement of structures (e.g., piles and floats) and the discharge of fill into the intertidal waters for con-

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[59] FSEIS, Sections 4.9 (Aquatic Resources: Freshwater) and 4.9.3 (Effects Common to Alternatives B, C, and D.

[60] See FSEIS, Sections 3.9 (Aquatic Resources: Freshwater) and 3.11 (Wildlife).

struction of an abutment for a docking facility would result in short term increases in suspended sediments in the water in the areas adjacent to the work activities. However, because the nearshore sediments are primarily coarse materials and cobbles, these materials would settle rapidly to the bottom, thus decreasing the magnitude and duration of the suspended sediment concentrations. In addition, the site is subject to the ebb and flow of the tide, and therefore, this added component of the marine tidal system would ensure that the subtidal and intertidal habitat values of the Cove would not be adversely impacted.[61] Reclamation of the site would result in removing all structures, and excavating the majority of the fill from below the High Tide Line, and flattening the rest to form a rocky subtidal substrate, all in conformance with the reclamation plan.

Least Environmentally Damaging Practicable Alternative Acreage Calculations.[62] (Note: The numbers below do not fully reflect the Reclamation and Closure Plan for the Kensington Gold Project, since the Reclamation Plan is a conceptual plan, and future revisions will be evaluated and approved by the Corps as appropriate.)

Based on information provided in the FSEIS, the application form and other documentation in the Corps' case files, and in the referenced documents (Attachment C), and calculating the acreages of impact[63] to

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61 FSEIS, Section 4.10.3, Effects of Alternatives B, C, and D (Aquatic Resources: Marine).

62 Data taken from the FSEIS.

63 See Least Damaging Acreage Calculations.

waters of the U.S. by project closure, Alternatives B, C, and D have the least permanent impacts (3.44 acres) to the aquatic environment over the anticipated life of the project. This conclusion remains the same when adding the impacts of the 1.3 acres of fill material for the Cascade Point breakwater for Alternatives B and D (not included in the net loss column below).

	ALTERNATIVES						
	A	A1	A2	A3	B	C	D
Initial Impact To Waters of the U.S. (Acres)	268.1	171.2	187	207	97.2	118.4	98.6
NET LOSS (Acres) After Reclamation	164	108.2	124	144	3.44	3.44	3.44

See Section VI, above, for a detailed description of each alternative.

In Alternatives A through A3, the filling of the Dry Tailings Facility area would all result in the permanent conversion of wetlands to uplands. Further as explained in Section VI above and Section VIII below, these alternatives are not practicable. Permanent loss of these wetlands is an adverse environmental impact. In Alternatives B, C, and D, construction of the Wet Tailings Storage Facility would result in the conversion of wetlands to a deepwater habitat (due to the rising water level), the edges or shallow portions of which will eventually become emergent wetlands/vegetated shallows.

These conversions of one type of water of the U.S. to another are not a significant permanent adverse impact to the aquatic environment, and the temporal losses discussed above would not result in significant permanent adverse impacts to the aquatic environment. Our evaluation places special emphasis on the

persistence and permanence of the effects described in this ROD and the FSEIS [see 40 CFR 230.10(c)]. The permanent loss of wetland functions and values in the Alternative A variants is more damaging and outweighs the temporary losses to the lake and its associated functions and values.

See Section XI, Subpart E, below, for a further discussion of the information provided in the acreage calculations. The Corps concludes that Alternative D is the least environmentally damaging practicable alternative because the impacts to the aquatic ecosystem are less harmful than the impacts of the Alternative A variants, which include permanent wetland losses, and it incorporates a water treatment system to ensure water quality is met.

VIII. PROJECT COST CALCULATIONS SUMMARY

We previously determined that the Alternative A variants were practicable alternatives. This was based on an assumption that since Alternative A had been permitted in 1998, it was still practicable to Coeur. We have reexamined that determination and, for the reasons explained below, now determine that neither Alternative A, nor any of its variants, is practicable.

The applicant submitted an "Alternative Material Disposal Sites Cost Analysis"[64] with an expense breakdown for each of the proposed preferred actions, as well as for each of the respective alternatives. This analysis, which included logistics, technology and cost considerations, demonstrated to

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64 Coeur Letter to the Corps, dated November 23, 2004.

the Corps that the applicant did not consider Alternative A to be a practicable alternative. Also, the Alaska Department of Natural Resources (ADNR) analyzed data provided by the applicant, and concluded[65], "Therefore, we do not consider Alternative A to be a 'practicable' or 'reasonable' alternative from the standpoint of cost or economics." The Corps reviewed and reevaluated the ADNR analysis documentation and other relevant ....

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65 Letter dated December 1, 2004, from the State of Alaska's Department of Natural Resources, Office of Project Management and Permitting, and addressed to David Cox of the USFS.

Commuting Ferry vs. Personnel Camp

A daily commuting ferry as described in Section VI of this ROD eliminates the need for an operational personnel camp. Coeur explained in its October 2004 Practicability Analysis that the annual cost to transport personnel to a camp is $5.296 million, compared to $1.49 million for Berners Bay access. Operating costs for a camp are estimated at more than $3 million annually. Operating a camp also requires substantial on-site fuel transportation and storage. It is our determination that Coeur's economic analysis supports the conclusion that a personnel camp is not practicable for cost reasons.

IX. FINDINGS

1. OTHER REQUIRED AUTHORIZATIONS:

   A. The Alaska Department of Environmental Conservation (ADEC) has issued a Certificate of Reasonable Assurance, dated May 6, 2005, with 15 conditions. Conditions on this Certification are listed on Attachment D of the ROD.

      The Certificate also stated, with reference to the proposed disposal of processed mine tailings into an alpine lake, that "The Tailing Disposal Facility (TDF) proposed to be constructed in Slate Creek will be considered a 'disposal site' under federal law and policy (see 40 CFR § 230.3(i)), and is hereby authorized as a 'treatment work' under State law (see AS 46.03.900(33)). Thus, State of Alaska water quality standards will not have to be met within that area. 18 AAC 70.010(c). Water discharged from the TDF shall

meet NPDES permit limitations, and the receiving water, East Fork Slate Creek, must meet State water quality standards."

B. The Alaska Department of Natural Resources, Office of Project Management and Permitting, Alaska Coastal Management Program, has issued a Final Consistency Response (Concurrence), dated April 25, 2005.

C. The USEPA, Region 10, has issued an Authorization to Discharge under the National Pollutant Discharge Elimination System (NPDES Permit), dated September 1, 2005.

D. See Attachment G for Cascade Point Docking Facility findings.

2. COMMENTS RECEIVED:

A. Coeur prepared several document summaries, each addressing comments received from Federal and State Agencies, to the Corps Public Notice, dated June 21, 2004, and to the Public Hearings, which were held by the USEPA in accordance with the USEPA's National Pollutant Discharge Elimination System (NPDES) regulations. The public hearings were held on July 26, 2004, in Juneau, Alaska, and on July 27, 2004, in Haines, Alaska (see case file).

B. FEDERAL AGENCIES

US ENVIRONMENTAL PROTECTION AGENCY [USEPA).

Comment dated August 20, 2004. Also, see Coeur's Response #18 (Attachment C). USEPA's comment letter, with three attachments, pertained to Goldbelt's proposed marine terminal at Cascade Point[70], and to the proposed changes to the Kensington Mine's Plan of Operations, which includes a marine terminal at Slate Creek Cove and a discharge into Lower Slate Lake. The USEPA's comments respective to Coeur's project centered on the 404(b)(1) Guidelines, and after several pages of instructive discussion relative to 40 CFR 230.10, the USEPA "...rated Alternatives A and A1[71] as 'Lack of Objection' and Alternatives B and C as 'Environmental Objections'." The USEPA concluded the cover letter with a request "...to work collaboratively with you and the State to achieve a satisfactory outcome."

USEPA ISSUE #1. "... the wetlands analysis in the DSEIS is biased due to the lack of accurate and detailed wetlands mapping on the Kensington side of the project area. Therefore, there is in-

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70 See Permit Application POA-1997-245-M

71 Note that Alternative A1 here is the same as Alternative A2 in this ROD.

sufficient information to make a reasonable judgment about the comparative effects of Alternatives A/A1 and Alternatives B/C on wetlands."

CORPS RESPONSE TO USEPA: The wetlands were properly delineated in accordance with the 1987 Manual on both sides of Lion's Heads Mountain and thus there 'is adequate information to analyze the potential impacts upon wetlands. See the discussion in Section VI (Alternatives Considered) of this ROD.

USEPA ISSUE #2. "With regard to the ecological risk of the tailings disposal options, the DTF (Dry Tailing Facility] (Alternatives A/A1) minimizes the exposure pathways by lining the dry stack cells, capping the dewatered tailings, treating DTF runoff in a storm water detention and sediment pond, and discharging a very small volume of treated water into a small creek devoid of fish. In contrast, the Lower Slate Lake tailings impoundment (Alternatives B/C) directly exposes the entire lake to the tailings, which have exhibited considerable toxicity (per the failed amphipod bioassay)."

CORPS RESPONSE TO USEPA: Lower Slate Lake is the least environmentally damaging practicable alternative location for the tailings disposal. The tailings will be capped at the cessation of operation unless information is presented to the contrary. See ADEC condition #15.

Testing of the tailings and water column of the impoundment will be completed quarterly to insure projected water quality modeling is accurate. See ADEC condition #8. In accordance with 33 U.S.C. 1341(d), all 401 conditions are incorporated Into the Department of the Army permit.
See Section XI of this ROD, Subpart B, Evaluation and Testing, and Constraints.

USEPA ISSUE #3. "Humpback whales are listed as an endangered species under the Endangered Species Act, and Steller sea lions are listed as a threatened species (although populations of both species appear to be increasing in Southeast Alaska."

CORPS RESPONSE TO USEPA: See the discussion in Section 1X.2.8. ENDANGERED SPECIES ACT (ESA) CONSULTATION PROCESS, in this ROD.

USEPA ISSUE #4. "The DSEIS also documents the potential impacts that each alternative may have on recreation, including noise, wakes, lights, safety issues, and visual impacts."

CORPS RESPONSE TO USEPA: See the FSEIS, Sections 4.13 (Land Use and Recreation), 4.14 (Visual Resources), 4.15 (Socioeconomics), 4.18 (Noise), and 4.21 (Cumulative Effects) .

USEPA ISSUE #5. "After the federal agencies published the DSEIS, but before EPA approved the draft NPDES permit,

EPA determined that the proposed effluent limits for some of the above pollutants could not be made without additional treatment. The applicant then revised the NPDES permit application to include a reverse osmosis (RO) wastewater treatment system and a pipeline diversion of Upper Slate Lake flows around Lower Slate Lake."

CORPS RESPONSE TO USEPA: Coeur has agreed to construct a Reverse Osmosis, or water treatment facility, to aid in the removal of pollutants from water discharged from Lower Slate Lake, as well as construction of a pipeline diversion (of waters around the impoundment and downstream to the dam spillway). These components are part of Alternative D.

USEPA ISSUE #6. "Due to the demonstrated toxicity of the tailings samples in the bioassay tests, and the limited application of other standard test on contaminant mobility and pathways, EPA believes that the tailings slurry is a carrier of contaminants (as defined in the Guidelines at 40 CFR 230.3)." (per the failed amphipod bioassay).

CORPS RESPONSE TO USEPA: There is no conclusive test data showing that toxic substances in the tailings caused amphipod mortality. The poor survival of the amphipods in the test cell may be attributed to smothering, the nature of how the material was placed, or the floatation agent(s) used in the bulk sample. See

FSEIS App. C and the discussion in Section VII above. Tests upon the tailings have conclusively shown that the tailings will not generate an acid discharge or result in a metals leachate being generated. We agree that all fish and most aquatic life would be lost during operation, (FSEIS 4.9.3). The FSEIS concluded that after closure Lower Slate Lake could be restored to at least equivalent aquatic habitat (see FSEIS 4.9.7). Capping of the impoundment tailings was added as a permit condition by ADEC to isolate any potential contaminants from the water column and to provide habitat for recolonization in the storage facility. The State of Alaska issued a 401 Certificate of Reasonable Assurance for Alternative a ADEC also stated that "the available information suggests that the toxicity risks associated with the tailings will be low during and after mining operations."[72] *Conditions were incorporated by ADEC to ensure that no potential contaminants would leave the disposal site condition #15. ADEC included a requirement for testing of the material on a quarterly basis condition #8. In addition the Corps agrees to add the following condition to the permit #10. The waters and the discharged processed mine tailing sediments, located in Lower Slate Lake, shall be tested, at lake closure or just prior to cessation of discharges of mine wastes into Lower Slate Lake, in accordance*

with appropriate testing requirements (at the ....

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Mitigation also includes funding by Coeur for the monitoring activities in Berners Bay. These activities will be conducted by the NMFS and the Alaska Department of Fish and Game.

Coeur has, in part as mitigation for unavoidable impacts to waters of the U.S., and in part as a result of agreements reached during the Endangered Species consultation process with the USFS and Coeur, agreed to provide funding to the NMFS and to the Alaska Department of Fish and Game, with the intent that these agencies will conduct the following monitoring activities in Berners Bay;

- Hydrocarbon monitoring in water, sediment, and mussel tissue. This would be an annual program with a 6-year commitment of monitoring.
- Annual aerial surveys of herring spawning monitoring in Berners Bay. This is an annual commitment with up to 10 flights per year.
- A trained observer will conduct marine mammal and bird surveys during ferry commutes across Berners Bay during the eulachon run.

The Corps has considered each of the mitigation items listed above and has concluded that all of these taken as a group satisfy the requirement of mitigating for the unavoidable impacts of the project.

XII. Compliance with Environmental Requirements: The issuance of permits for the proposed project is in compliance with applicable environmental requirements. The development of the

DSEIS and the FSEIS was accomplished in accordance with the National Environmental Policy Act of 1969, as amended. Recommendations of the USFWS prepared pursuant to the Fish and Wildlife Coordination Act of 1958, as amended, have been fully considered in the permit decision, Coordination with the NMFS pursuant to Section 7 of the Endangered Species Act of 1973, as amended, has been completed. The recommendations of the USEPA have been fully considered. An evaluation of the discharge of fill material and dredged fill material as required by Section 404(b)(1) of the Clean Water Act, 40 CFR 230, was completed and is attached to this document[137]. The discharge complies with the guidelines, with the inclusion of the' appropriate and practicable conditions listed in Attachment D to minimize pollution and the adverse effects to the affected ecosystem. I find that issuance of permits as described above is in conformance with these guidelines. The Alaska Department of Natural Resources has issued a Coastal Zone Management Consistency Determination, and ADEC has issued a Certificate of Reasonable Assurance, with conditions. Both of these documents will be incorporated into and become part of the Corps permits.

XIII. Section 176(c) of the Clean Air Act General Conformity Rule Review. The proposed project has been analyzed for conformity applicability pursuant to regulations implementing Section 176(c) of the Clean Air Act. It has been shown that the activities proposed under this permit will not exceed *de minimis* levels of direct emissions of a

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[137] See Attachment B and G.

criteria pollutant or its precursors and are exempted by 40 CFR Part 93.153. This no effect determination has been coordinated with the U.S. Environmental Protection Agency and the Alaska Department of Environmental Conservation. Any later indirect emissions are generally not within the Corps continuing program responsibility and generally cannot be practicably controlled by the Corps. For these reasons a conformity determination is not required for this individual permit.

XIV. Determination. I find that the issuance of the Corps permits, as described by regulations published in 33 CFR Parts 320 through 330, with the scope of work as described in this document is based on a thorough analysis and evaluation of all issues set forth in this ROD. There are no less environmentally damaging, practicable alternatives available to the applicants that will achieve the purposes for which the work is being proposed; the proposed work is deemed to comply with established Federal, State and local laws, regulations, and codes; the issuance of these permits is consistent with National Policy, statutes, and administrative directives; and on balance, issuance of Corps permits to Coeur and Goldbelt for the proposed work is not contrary to the public interest. As explained in Subpart H, above, all practicable means to avoid and/or minimize environmental harm from the selected, permitted alternatives have been adopted and required by terms and conditions of these permits.

29 Mar 2006
Date

/s/Timothy J. Gallagher
Timothy J. Gallagher
Colonel, Corps of Engineers
District Engineer

APPENDIX R

Department of Army, Corps of Engineers
Alaska District

Section 404(b)(1) Guidelines Evaluation

KENSINGTON GOLD PROJECT
POA-1990-592-M

This document, which will be attached to and become part of the Corps Record of Decision (ROD), constitutes a Section 404(b)(1) Guidelines (Guidelines) Evaluation of Coeur Alaska's (Coeur) proposed Kensington Gold Project as described in Coeur's final Department of the Army (DA) permit application. This evaluation addresses the potential environmental effects from the discharges of dredged or fill material to waters of the United States (U.S.), including wetlands, associated with the project. These effects are described in the U.S. Forest Service (USFS) Final Supplemental Environmental Impact Statement (FSEIS) for the Kensington Gold Project. A site-specific evaluation is presented here for the project in sufficient detail for final decision-making

and compliance with the Guidelines requirements. Information presented here will be summarized in the ROD. Attachment C to the ROD lists references drawn upon for this evaluation.

Coeur proposes to discharge an approximate total of 3,487,950 cubic yards (cy) of fill material into an approximate total of 98.6 acres of waters of the U.S., including forested and scrub shrub wetlands, in conjunction with the construction of new mine facilities and associated infrastructure. The applicant's stated purpose for the project would be the "relocation of the major mine components from the Kensington Mine site at Comet Beach on Lynn Canal, to the Jualin Mine site (approximately two miles to the southeast), at Slate Cove, on the west side of Berners Bay, in order to access the ore body from the Jualin side of the peninsula." The project is discussed in the FSEIS, and includes several inter-related project components. The overall mine operation project would need the following components: (1) building pads for milling facilities, administrative and support facilities; (2) tailings disposal facilities; (3) fill pads associated with pipelines; (4) a waste rock disposal site; (5) access roads and bridge abutments; (6) staging and laydown areas; (7) an infiltration gallery; (8) material and topsoil stockpiles; (9) a marine dock facility; and (10) berms to encircle settling and storage ponds.

The applicant's preferred alternative, Alternative D, as described in the FSEIS, will be addressed in this Guidelines evaluation. The proposed work description includes activities which are not subject to Section 404 of the Clean Water Act (Section 404), and they are not part of this evaluation. This includes the placement of structures (floats, docks and

piles), in navigable waters of the U.S. for the construction of a marine terminal in Slate Creek Cove, which are subject to Section 10 of the Rivers and Harbors Act of 1899. The activities subject to Section 404 are the discharges of dredged or fill material into waters of the U.S.

Coeur submitted a practicability analysis along with a cost analysis breakdown for their proposed actions (Lower Slate Lake disposal site, the Slate Creek Cove marine terminal, and infrastructure (roads, building pads, etc.) associated with the mining operation), to include an analysis for each of the primary alternatives considered.[1] An evaluation of these documents as well as other information sources indicates that, though the previously permitted site (Alternative A in the FSEIS) was once determined to be practicable, it is not currently practicable to the applicant due to cost and logistics. By contrast, the applicant's preferred alternative (Alternative D) is the least environmentally damaging practicable alternative.[2]

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[1] See discussion in the Corps ROD.

[2] Alternative Material Disposal Sites Cost Analysis.

PROJECT COMPONENT:
MATERIAL DISPOSAL
(LOWER SLATE LAKE)

I. Evaluation of Compliance with 404(b)(1) Guidelines [restrictions on discharge, 40 CFR § 230.10(a)-(d)]

a. Alternatives Test. Refer to information discussed in the DSEIS, plus the Applicant's Section 404(b)(1) Evaluation, dated November 17, 2004, for additional references.

	Yes	No
(1) Is there a practicable alternative to the proposed discharge, which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences? (For this requirement practicable alternatives may include activities which do not involve discharges to waters of the U.S. or discharges at other locations in waters of the U.S.) *The applicant submitted a Practicability Analysis and a Cost Analysis breakdown for the proposed action, Alternative A along with its respective alternative (described in file number POA-1990-592-2), also referred to as Alternative A. The Alaska Department of Natural Resources (ADNR) analyzed the practicability of the applicant's preferred alternative versus*	*4 ☐	☒

Alternative A, and determined[3] *that alternative A was neither practicable nor reasonable from the standpoint of cost or economics. The Corps reviewed these documents and other relevant information and independently determined that the previously authorized site was not practicable to the applicant due to cost and logistics, and that based on the similarities (location, logistics of material transport, construction and operation of the facility, etc.) of the alternative variants of Alternative A (Alternatives A1 through A3), these three variations were also not practicable. In addition, the Corps also determined Alternative A and its three variants were not less environmentally damaging as they would result in the permanent loss of 34 to 113 acres of wetlands, which are a special aquatic site and are afforded greater protection under the Section 404(b)(1) Guidelines. Alternative D would result in the permanent loss of 3.44 acres of wetlands due to dam construction, the temporal loss of 20 acres of deep water habitat (Lower Slate Lake), and the conversion of 39 acres of wetland to deepwater habitat (lake). After project closure and reclamation, the lake would measure 62 acres and would be restored to*

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[3] ADNR Letter, dated December 1, 2004, addressed to the USFS.

the equivalent habitat value that existed prior to the project. This would include 47 acres of deepwater habitat and 15 acres of emergent wetlands / vegetated shallows.

(ii) If the project is in a special aquatic site and is not water dependent, has the applicant clearly demonstrated that there are no practicable alternative sites available? *Not applicable. Fill material would be discharged to construct a dam in 3.44 acres of wetlands adjacent to the creek outlet of Lower Slate Lake. However, dams are a water dependent activity as they must be located in the outlet creek and its adjacent wetlands in order to fulfill their basic purpose of impounding water, The currently permitted material disposal site,[5] otherwise referred to as Alternative A, or the No Action Alternative, is a Palustrine Forested & Scrub-shrub Wetland, whereas the applicant's preferred alternative, Lower Slate Lake, is a deep-water habitat (20 acres) with a narrow and irregular emergent wetland fringe. The mine tailings would be disposed of in the deepwater habitat (Lower Slate Lake), which is not a special aquatic*

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☐	☐
NA	NA

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[4] An * is marked above the answer that would indicate noncompliance with the Guidelines.

[5] *DEIS, Sections 3.12.3, and 4.12. Also, see* POA-1990-592-M.

site under the Guidelines. See the ROD for a discussion of project costs,[6] *as well as ADNR 's letter addressed to the USFS, dated December 1, 2005. See the FSEIS, Section 2, for a discussion of alternatives. Documentation in the FSEIS examined alternative material disposal locations*[7] *and determined that the lake site was the only acceptable one for their purposes. The Corps examined the proposed site as well as the permitted site, and all available information and determined that the lake site is the least environmentally damaging practicable alternative.*

b. Special restriction. Will the discharge:
Refer to the Applicant's Section 404(b)(1) Evaluation, dated November 17, 2004, for additional references.

	*	
(i) Violate State water quality standards?[8] Not applicable. *DSEIS: Section 4.6, Appendix A: Surface Water Quality. FSEIS: Section 4.6.7 See Section 401 Water Quality Certification, issued by the Alaska Department of Environmental Conservation, dated May 6, 2005.*	☐	☒

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[6] ROD, Section VII. Project cost Calculations Summary.

[7] USFS FSEIS, Section 2.4 Project Alternative and Components Considered but not Studied in Detail.

[8] ADEC letter to the Corps, dated December 6, 2004.

(ii) Violate toxic effluent standards (under Section 307 of the Act)? *DSEIS: Section 4.6, Appendix A: Surface Water Quality. FSEIS: Appendix A: Water Quality Analysis.*	* ☐	☒
(iii) Jeopardize endangered or threatened species or their critical habitat? *DSEIS: Sections 4.10 and 4,11. FSEIS: Sections 4.10,3, and 4.11.2. Also, refer to attached Rod, discussion of comments received, with specificity to ESA consultation.*	* ☐	☒
(iv) Violate standards set by the Department of Commerce to protect marine sanctuaries? *Not Applicable (NA). There are no marine sanctuaries on or near the project site.*	* ☐ NA	☐ NA

c. Other restrictions. Will the discharge contribute to significant degradation of "waters of the United States" through adverse impacts to: *Refer to the Applicant's Section 404(b)(1) Evaluation, dated November 17, 2004, for additional references. Also, see the FSEIS: Appendix A, Water Quality Analysis.*

	Yes	No
(i) Human health or welfare, through pollution of municipal water supplies, fish, shellfish, wildlife and special aquatic sites? *See DSEIS: Sections 4.8, Groundwater Quality; 4.6, Surface Water Quality; and 4.12, Soils, Vegetation, and Wetlands. FSEIS: Section 4.7.3, Groundwater Quality; 4.5.6, Surface Water Quality; 4.12.3, Wetlands.*	* ☐	☒

(ii) Life stages of aquatic life and other wildlife? *DSEIS: Sections 4.11, Wildlife; and 4.12, Soils, Vegetation, and Wetlands. Also, refer to Section XI of the ROD.*	* ☐	☒
(iii) Diversity, productivity and stability of the aquatic life and other wildlife or wildlife habitat or loss of the capacity of wetlands to assimilate nutrients, purify water or reduce wave energy? *DSEIS: Sections 4.6; 4.9; 4.11; and 4.12. FSEIS:4.9.6., 4.11.2., and 4.12.3.*	* ☐	☒
(iv) Recreational, aesthetic and economic values? *DSEIS: Sections 3.13 through 3.15; and 4.13 through 4.15. FSEIS: 4.13.3., 4.14.3., 4.15.3.*	* ☐	☒
d. Actions to minimize potential adverse impacts (mitigation). Will all appropriate and practicable steps (40 CFR § 230.70-77, Subpart H) be taken to minimize the potential adverse impacts of the discharge on the aquatic ecosystem? [Refer to the Applicant's Section 404(b)(1) Evaluation, dated November 17, 2004, for additional references.] *DEIS: Section 2.5. FSEIS: Section 2.5.1: Mitigation. For follow-up, refer to ROD, Section VII, Subpart G.*	☒	* ☐

II. Factual Determinations (40 CFR § 230.11)

The determinations of potential short-term or long-term effects of the proposed discharges of dredged or

fill material on the physical, chemical and biological components of the aquatic environment included items a – h, below, in making a findings of compliance or non-compliance.

Subpart C: Potential Impacts on Physical & Chemical Characteristics of the Aquatic Ecosystem;
Subpart D: Potential Impacts on Biological Characteristics of the Aquatic Ecosystem;
Subpart E: Potential Impacts on Special Aquatic Sites; and
Subpart F: Potential Impacts on Human Use Characteristics.
Subpart G: Evaluation and Testing

There is potential for short-term or long-term adverse effects (in light of Subparts C-G, listed above) of the proposed discharge as related to:

	Yes	No
a. Physical substrate determinations *[FSEIS: Section 4.12.1; Appendix C].* *The project site is a deep water lake with an irregular emergent wetland fringe. The lake bottom soils are primarily sandy silt, underlying organic mats. During the life of the project, the lake substrate would be covered by processed mine wastes, consisting of grains that are sand sized to very fine material. No dredging or other impacts to the substrate would occur. However, the substrate under the proposed dam is primarily emergent wetland, all of which would be mechanically land cleared rior to the deposition of fill to construct the dam.*	☒	☐

b. Water circulation, fluctuation and salinity determinations
[FSEIS: Section 3.6 through 3.10] ☒ ☐
The lake is fairly shallow, approximately 51 feet deep, with little stratification. There are no water currents, other than wind driven. The proposed dam would permanently block flow out of the lake and there would be little fluctuation in water level. Salinity is not applicable to this freshwater lake.

c. Suspended particulate/turbidity determinations *[FSEIS, Appendix C - Ecological Risk Assessment of Aqueous Tailings Disposal at the Kensington Goldmine]* ☒ ☐
The introduction of mine tailings into the lake would result in an increase of total suspended solids (TSS)). The TSS would be discharged at the deepest portion of the lake via a slurry pipeline and silt curtains would be required to minimize the size of the silt plume. A nontoxic chemical flocculent would be added to the slurry to enhance the deposition of suspended particles in the Lower Slate Lake disposal site. These effects would persist as long as the tailings discharge occurred. Upon project closure the tailings would be capped and suspended particulate/turbidity levels would be equal to pre-project conditions.

d. Contaminant determinations
[FSEIS, Appendix C - Ecological Risk Assessment of Aqueous Tailings Disposal at the Kensington Goldmine] ☒ ☐
Testing was performed on the tailings material to be placed in Lower Slate Lake. The principal contaminants of concern would be aluminum, chromium, pH, and Total Suspended Solids. There are anticipated to be short term effects. Over the short and long term acceptable constraints are available and would be implemented to ensure contaminants are reduced to acceptable levels within the disposal site and would not be transported beyond the limits of the disposal site.

e. Aquatic ecosystem structure and function determinations
[FSEIS: Section 4.9 and 4.12] ☒ ☐
The USFS and the Corps determined that with the introduction of processed mine waste, all of the macroscopic and most if not all of the microscopic life in the lake would die. This would be a temporal effect as after project closure the lake's aquatic ecosystem structure and functions would be restored and expanded.

f. Proposed disposal site determination (disposal sites and/or size of mixing zone are acceptable) ☐ ☒
[FSEIS: Section 2, Description of proposed actions and other Alternatives].

g. Determination of cumulative effects on the aquatic ecosystem
[FSEIS: Sections 4.12 and 4.21] ☒ ☐
After project closure there would an approximate increase in size of the lake by greater than 260% to approximately 62 acres with a water depth of about 30 feet. This would be a beneficial impact.

h. Determination of secondary effects on the aquatic ecosystem
[FSEIS: Section 4] ☒ ☐
Secondary effects of the dam and tailings discharge would include an increase in the size of Lower Slate Lake and the surface water elevation of Lower Slate Lake. In addition, there would be noise and air quality impacts from the operation of heavy equipment used to construct the dam.

III. Technical Evaluation Factors 40 CFR § 230 Subparts C-F

a. Potential Impacts on Physical and Chemical Characteristics of the Aquatic Ecosystem (Subpart C) *FSEIS-Section 4.0 Environmental Impacts*	Ssignificant	Not significant
1. Substrate *[FSEIS: Sections 4.3 and 4.4, Appendix C]*	☐	☒
2. Suspended particulates/turbidity *[FSEIS, Appendix C - Ecological risk Assessment of Aqueous Tailings Disposal at the Kensington Goldmine]*	☐	☒
3. Water *[FSEIS: Section 4.5 through 4.10]*	☐	☒
4. Alteration of current patterns and water circulation *[FSEIS: Section 4.5]*	☐	☒
5. Alteration of Normal Water fluctuations/hydro period *[FSEIS: Sections 4.5 and 4.7]*	☐	☒
6. Alteration of salinity gradients *[FSEIS: Sections 4.3]*	☐	☒

b. Potential Impacts on the Biological Characteristics of the Aquatic Ecosystem (Subpart D)

1. Threatened and Endangered species (§ 230.30) [*See ROD, Endangered Species Act, Consultation Process*]. *NA. There are no threatened or endangered species or their critical habitat within this portion of the project area.*	☐	☐
2. Aquatic Food Web (§ 230.31) *[FSEIS: Sections 4.9 & 4.10]* *The discharge of the mine tailings would result in elimination the lake's food web during operation. However, this function would be restored upon closure of the disposal facility.*	☐	☒
3. Other wildlife *[FSEIS: Section 4.11]*. *Modification of the lake would result in impacts to wildlife, such as waterfowl, deer, bear and various small mammals.*	☐	☒

c. Potential Impacts on Special Aquatic Sites (Subpart E)

1. Wetlands *[FSEIS: Sections 4.9 & 4.12]*. *The project site (Lower Slate Lake)is primarily a deep water habitat with a narrow emergent wetland fringe. Con-*	☐	☒

struction of the dam to create the impoundment would result in the permanent loss of 3.44 acres of wetlands. The expansion of the lake would involve inundating approximately 39 acres of adjacent forested and scrub-shrub wetlands, converting them to deep water habitat.

2. Sanctuaries and refuges ☐ ☐
[FSEIS: Section 4.11]
NA. There are no sanctuaries or refuges in the project area.

3. Mud Flats – NA. ☐ ☐
There are no mud flats in the project area.

4. Vegetated Shallows – ☐ ☒
There are vegetated shallows in Lower Slate Lake. These would be inundated and converted to deepwater habitat. After project closure the lake would be restored to a mixture of deepwater habitat and emergent wetland/vegetated shallows along the lake margins.

5. Coral reefs – NA. ☐ ☐
There are no coral reefs in the project area.

6. Riffle and pool complexes – *NA.* ☐ ☐
There would not be any discharges to riffle/pool complexes.

d. Potential Effects on Human Use Characteristics (Subpart F)

Description of Social Environment [Base condition]: See FSEIS, Sections 4.0 Environmental Impacts, and 3.15 Socioeconomics.

1. Effects on municipal and private water supplies - *NA.* ☐ ☐
The project would not impact either municipal and private water supplies.

2. Recreational and Commercial fishing impacts (including subsistence fishing) *FSEIS: Sections 4.15 & 4.20.* ☐ ☐
NA. Lower Slate Lake is not subject to fishing pressure, whether subsistence, recreational or commercial.

3. Effects on water-related recreation *[FSEIS: Section 4.13]* ☐ ☐
NA. Lower Slate Lake is isolated from roads and has not been recorded as having any recreational values. The proposed discharge would not impact water related recreation.

4. Aesthetics *[FSEIS: Section 4.14]* ☐ ☒
The discharge of fill would adversely impact the site's aesthetic values, however upon project closure the site's aesthetic values would be restored.

4. Effects on parks, National and historic monuments, National seashores, wilderness areas, research sites, and similar preserves. ☐ ☐
NA. the project site is not located in one of these areas.

IV. Evaluation of Dredged or Fill Material (Subpart G, 40 CFR § 230.60)

a. The following information has been considered in evaluating the biological availability of possible contaminants in dredged or fill material: (checked boxes apply). *[FSEIS Appendix C - Ecological Risk Assessment of Aqueous Tailings Disposal at the Kensington Goldmine]*

1. ☒ Physical characteristics (receiving waters, bottom sediments, slurry constituents).
2. ☒ Hydrography in relation to known or anticipated sources of contaminants
3. ☒ Results from previous testing of the material or similar material in the vicinity of the project
4. ☐ Known, significant, sources of persistent pesticides from land runoff or percolation

5. ☐ Spill records for petroleum products or designated (§ 311 of CWA) hazardous substances
6. ☒ Other public records of significant introduction of contaminants from industry, municipalities or other sources
7. ☒ Known existence of substantial material deposits of substances which could be released in harmful quantities to the aquatic environment by man-induced discharge activities

b. An evaluation of the information above indicates that there is reason to believe the proposed dredged or fill material is not a carrier of contaminants, or that levels of contaminants are substantively similar at extraction and disposal sites. The material meets the testing exclusion criteria.[9] *The tailings material was tested and will contain contaminants. See factual determinations, above.* ☐ Yes ☒ No ☐ Unknown

c. Is the discharge site adjacent to the extraction site and subject to the same sources of contaminants, or are the materials at the two sites substantially similar? ☐ Yes ☒ No ☐ Unknown

d. If there is a high probability that the material proposed for discharge is a carrier of contaminants, or are there constraints available that are acceptable to the permitting authority and the Regional Administrator to reduce potential contamination to acceptable levels within the disposal site? ☒ Yes ☐ No

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[9] ADEC letter to the Corps, dated December 6, 2004.

As noted above the material has been tested and would contain contaminants. Constraints are available and will be implemented to ensure potential contamination is reduced to acceptable levels and that contaminants will not be transported beyond the disposal site. See ROD Section XI, Subpart G for a complete description of these constraints.

V. Disposal Site Determination 40 CFR § 230.11(f)

a. The following factors, as appropriate, have been considered in evaluating the disposal site.

1. Depth of water at the disposal site	☒
2. Current velocity, direction, and variability at disposal site	☐
3. Degree of turbulence	☐
4. Water column stratification	☐
5. Discharge vessel speed and direction	☐
6. Rate of discharge	☒
7. Dredged material characteristics	☐
8. Other factors affecting rates and patterns of mixing	☒

b. An evaluation of the appropriate factors in V.a. above indicates that the disposal site and/or size of mixing zone is acceptable. ☒ Yes ☐ No

VI. Actions to Minimize Adverse Effects (Subpart H, 40 CFR § 230.70)

All appropriate and practicable steps would be taken, through application of recommentations of § 230.70 - 230.77, to ensure minimal adverse effects of the proposed discharge. ☒ Yes ☐ No

Actions taken: Inclusion of Best Management Practices in the Mining Plan of Operations (POO), DA Permit Special Conditions to include incorporation of the Mining P00, inclusive of reclamation appendix. See Attachment D to the ROD, for a list of Special Conditions to be appended to the Corps (DA) permit. State and local permits have been conditioned to reduce impacts resulting from the material discharge into Lower Slate Lake, as well as into adjacent waters of the United States, including wetlands.

VII. Findings of Compliance or Non-compliance (40 CFR § 230.12)

a. ☐ On the basis of these Guidelines (Subparts C through G), the proposed disposal site for discharge of dredged or fill material complies with the Section 404(b)(1) guidelines

b. ☒ On the basis of these Guidelines (Subparts C through G), the proposed disposal site for the discharge of dredged or fill material complies with the Section 404(b)(1) Guidelines with the inclusion of the appropriate and practicable discharge conditions to minimize pollution or adverse effects to the affected aquatic ecosystem. See Attachment D for a complete list of Special Conditions to be attached to the permit.

c. ☐ The proposed disposal site for discharge of dredged or fill material does not comply with the Section 404(b)(1) guidelines for the following reasons:

1. There is a less damaging practicable alternative ☐
2. The proposed discharge will result in significant degradation of the aquatic ecosystem ☐
3. The proposed discharge does not include all practicable and appropriate measures to minimize potential harm to the aquatic ecosystem ☐
4. There does not exist sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with these Guidelines. ☐

PROJECT COMPONENT:
MARINE TERMINAL
(SLATE CREEK COVE)

I. Evaluation of Compliance with 404(b)(1) Guidelines [restrictions on discharge, 40 CFR § 230.10(a)(d)]

a. Alternatives Test. Based on information discussed in the FSEIS,

Preliminary:	Yes	No
(i) Is there a practicable alternative to the proposed discharge, which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences? (For this requirement practicable alternatives may include activities which do not involve discharges to waters of the U.S. or discharges at other locations in waters of the U.S.) *The applicant submitted a Practicability Analysis and a Cost Analysis breakdown*[10] *for the proposed action, and its respective alternative (described in file number POA-1990-592-2). The Alaska Department of Natural Resources (ADNR) analyzed the practicability of the appli-*	* ☐	☒

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[10] Alternative Material Disposal Sites Cost Analysis, submitted November 19, 2004, and corrected on November 23, 2004.

cant's preferred alternative versus Alternative A, and determined [11] *that alternative A was neither practicable nor reasonable from the standpoint of cost or economics. The Corps reviewed these documents and other relevant information and Independently determined that although both alternatives were feasible, the alternative site (Comet Beach) described as the permitted action,* [12] *and as the No Action Alternative in the FSEIS, was not practicable due to cost, and logistics, and would not be less environmentally damaging. We have determined Slate Creek Cove to be the least environmentally damaging practicable alternative*

(ii) If the project is in a special aquatic site and is not water dependent, has the applicant clearly demonstrated that there are no less environmentally damaging practicable alternative sites available? *The proposed discharges at Slate Creek Cove for the marine terminal include a discharge to approximately 1 acre of wetlands(a special aquatic site) for a staging/storage area located above the high tide line. Staging/storage are not water dependent activities as they do not*

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[11] ADNR Letter, dated December 1, 2004, addressed to the USFS.

[12] Corps permit, POA-1990-592-2, Issued May 6, 1998.

require access or proximity to or siting in special aquatic sites in order to fulfill their basic purpose. As noted in (i) above the applicant submitted a Practicability Analysis and a Cost Analysis breakdown[13] for the proposed action, and its respective alternative (P0A-1990-592-2). The Corps has reviewed all available information and determined the applicant has clearly demonstrated there are no less environmentally damaging practicable alternative sites available

b. **Special restriction. Will the discharge:** *Refer to the Applicant's Section 404(b)(1) Evaluation, dated November 17, 2004, for additional references. Note that the applicant's evaluation is for reference only, and has not been incorporated by reference anywhere in this document or in the ROD.*

(i) violate State water quality standards? *See FSEIS, Appendix A: Water Quality Analysis. Also, see Section 401 Water Quality Certification, issued by the Alaska Department of Environmental Conservation, dated May 6, 2005.*	* ☐	☒
(ii) violate toxic effluent standards (under Section 307 of the Act)? *See FSEIS,*	* ☐	☒

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[13] Alternative Material Disposal Sites Cost Analysis, submitted November 19, 2004, and corrected on November 23, 2004.

Section4.10.3, Aquatic Resources: Marine.

(iii) jeopardize endangered or threatened species or their critical habitat? *See ROD, under Consideration of Comments, Endangered Species Act Consultation Process.* * ☐ ☒

c. Other restrictions. Will the discharge contribute to significant degradation of "waters of the United States" through adverse impacts to: *See FSEIS, Section 4.0 Environmental Impacts, and Appendix A, Water Quality Analysis. Also, see applicant's Section 404(b)(1) Evaluation, dated November 17, 2004, for additional references.*

	Yes	No
(i) Human health or welfare, through pollution of municipal water supplies, fish, shellfish, wildlife and special aquatic sites? *See FSEIS: Section 4.10 and 4.11.*	* ☐	☒
(ii) life stages of aquatic life and other wildlife? *FSEIS, Section 4.11.*	* ☐	☒
(iii) diversity, productivity and stability of the aquatic life and other wildlife or wildlife habitat or loss of the capacity of wetlands to assimilate nutrients, purify water or reduce wave energy? *See FSEIS, Section 4.0 Environmental Consequences.*	* ☐	☒
(iv) recreational, aesthetic and economic values? *See FSEIS, Sections 4.14 and 4.15.*	* ☐	☒

d. Actions to minimize potential adverse impacts (mitigation). Will all appropriate and practicable steps (40 CFR § 230.70-77, Subpart H) be taken to minimize the potential adverse impacts of the discharge on the aquatic ecosystem? *See Applicant's Section 404(b)(1) Evaluation, dated November 17, 2004. See FSEIS, Section 2.5.2..*	☒	☐ *

II. Factual Determinations (40 CFR § 230.11)

The determinations of potential short-term or long-term effects of the proposed discharges of dredged or fill material on the physical, chemical and biological components of the aquatic environment included items a – h, below, in making a findings of compliance or non-compliance.

Subpart C: Potential Impacts on Physical & Chemical Characteristics of the Aquatic Ecosystem;
Subpart D: Potential Impacts on Biological Characteristics of the Aquatic Ecosystem;
Subpart E: Potential Impacts on Special Aquatic Sites; and
Subpart F: Potential Impacts on Human Use Characteristics.
Subpart G: Evaluation and Testing

There is potential for short-term or long-term adverse effects (in light of Subparts C-G, listed above) of the proposed discharge as related to:

Yes No

a. Physical substrate determinations *[See FSEIS, Sections 3.3, and 3.12, and the Final Mining Plan of Operations, inclusive of Appendix 1].* ☒ ☐

The proposal is to discharge fill material into intertidal waters as well as into wetlands located above the High Tide Line (HTL), all in conjunction with the construction of a marine terminal in Slate Creek Cove. Final reclamation require reclamation of the intertidal fill and restoration of the staging/storage area to wetland. The temporary fill discharge into the intertidal waters, would allow for natural recolonization by benthic flora and faunal species.

b. Water circulation, fluctuation and salinity determinations *[See FSEIS, Sections 2.3.18, and 3.10, and 3.3 and 4.10.]* ☒ ☐

There would be a short term, localized effect due to the fill below the high tide line. But the placement of fill would not alter the tidal pattern. The wetlands at the staging/storage area are not inundated by surface water and there would be little effect.

c. Suspended particulate/turbidity determinations *[See FSEIS, Sections 3.10, and 4.10]* ☒ ☐

The discharge of fill into the intertidal waters would occur at low tide. There is expected to be minimal turbidity. Any suspended sediment

would be flushed out of the cove by the tidal action.

d. Contaminant determinations ☐ ☒
Only clean fill material would be discharged and it would not be a carrier of contaminants.

e. Aquatic ecosystem structure and function determinations *[See FSEIS, Section 4.10.]* ☒ ☐
The discharge of fill material into waters and U.S. in Slate Creek Cove would result in the minor and temporary disruption of the cove's inhabitant, and would be restored after project closure. The discharge into wetlands for the staging/storage area would result in a temporal loss, the area would be restored after project closure.

f. Proposed disposal site determination (disposal sites and/or size of mixing zone are acceptable) ☒ ☐
The project site is subject to tidal waters and the twice daily flushing of the cove waters. Due to the water depths of the cove as well as tidal actions, the size of the mixing zone is acceptable.

g. Determination of cumulative effects on the aquatic ecosystem
[See FSEIS, Sections 4.21] ☒ ☐
The cumulative direct impacts to Slate Creek Cove by the discharge of intertidal fill would be

minimal. The cumulative effects of the discharge to wetlands for the staging/storage area would also be minimal. Both areas would be restored upon project closure.

h. Determination of secondary effects on the aquatic ecosystem
[See FSEIS, Section 4; and Table 4-38, pages 4-152 through 154] ☒ ☐
Secondary impacts would be those associated with operation of the facility. They would include noise and air quality due to heavy equipment operation, as well as human disturbance. These impacts would be minimal and would cease upon project closure.

III. Technical Evaluation Factors 40 CFR § 230 Subparts C-F

a. **Potential Impacts on Physical and Chemical Characteristics of the Aquatic Ecosystem** (Subpart C) FSEIS: Section 4.0 Environmental Impacts.	Significant	Not significant
1. Substrate [FSEIS: Sections 4.3 and 4.4]	☐	☒
2. Suspended particulates/turbidity [FSEIS: Sections 4.5 and 4.9]	☐	☒
3. Water [FSEIS: Section 4.5 through 4.10]	☐	☒
4. Alteration of current patterns and water circulation [FSEIS: Section 4.5]	☐	☒
5. Alteration of Normal Water fluctuations/hydro period [FSEIS: Sections 4.5 and 4.7]	☐	☒
6. Alteration of salinity gradients [FSEIS: Sections 4.3]	☐	☒

b. Potential Impacts on the Biological Characteristics of the Aquatic Ecosystem (Subpart D) *See FSEIS, Section 4.0*

1. Threatened and Endangered species (§ 230.30) [*See ROD, Endangered Species Act, Consultation Process*].	☐	☒
2. Aquatic Food Web (§ 230.31) *[FSEIS: Section 4.10]*	☐	☒
3. Other wildlife *[FSEIS: Section 4.11]*.	☐	☒

c. Potential Impacts on Special Aquatic Sites (Subpart E) — The intertidal area is not a special aquatic site. The staging/storage area would involve the discharge of fill into wetlands.

1. Wetlands: *[FSEIS, Section 4.12]. Approximately 1 acre of wetlands would be filled. They would be restored upon project closure*	☐	☒
2. Sanctuaries and refuges: *NA. There are no sanctuaries or refuges in the project area.*	☐	☐

3. Mud Flats: *NA. There are no mud flats in the project area.*	☐ ☐
4. Vegetated Shallows: *NA. There are no vegetated shallows in the project area.*	☐ ☐
5. Coral reefs: *NA. There are no coral reefs in the project area.*	☐ ☐
6. Riffle and pool complexes – *NA. There are no riffle and pool complexes in the project area.*	☐ ☐

d. Potential Effects on Human Use Characteristics (Subpart F) *Description of Social Environment* [Base condition]: Refer to *See Applicant's Section 404(b)(1) Evaluation, dated November 17, 2004. Also, FSEIS, Section 4.15.*

1. Effects on municipal and private water supplies: *NA. The project would not impact either municipal or private water supplies.*	☐ ☐
2. Recreational and Commercial fishing impacts (including subsistence fishing): *NA. The site has not been recorded as being used for recreational, commerial and/or subsistence fishing.*	☐ ☐

3. Effects on water-related recreation: *[FSEIS: Section 4.13]* *NA. The site has not been recorded as being used for water related recreational purpose.*	☐	☐
4. Aesthetics *[FSEIS: Section 4.14]* *Aesthetic values are dependent upon the subjective interpretation of the observer, and therefore positive, negative, or no effect impacts would be expected. The work would conform to the existing aesthetic settings which include, historical use by the Jualin Mine Company.*	☐	☒
4. Effects on parks, national and historic monuments, national seashores, wilderness areas, research sites, and similar preserves. *See FSEIS, Section 4.13. NA. The site is not located in one of these areas.*	☐	☐

IV. Evaluation of Dredged or Fill Material (Subpart G, 40 CFR § 230.60)

a. The following information has been considered in evaluating the biological availability of possible contaminants in dredged or fill material: (checked boxes apply).

1. ☒ Physical characteristics

2. ☒ Hydrography in relation to known or anticipated sources of contaminants
3. ☒ Results from previous testing of the material or similar material in the vicinity of the project
4. ☐ Known, significant, sources of persistent pesticides from land runoff or percolation
5. ☐ Spill records for petroleum products or designated (§ 311 of CWA) hazardous substances
6. ☒ Other public records of significant introduction of contaminants from industry, municipalities or other sources
7. ☒ Known existence of substantial material deposits of substances which could be released in harmful quantities to the aquatic environment by man-induced discharge activities

b. An evaluation of the information above indicates that there is reason to believe the proposed dredged or fill material is not a carrier of contaminants, or that levels of contaminants are substantively similar at extraction and disposal sites. The material meets the testing exclusion criteria. ☒ Yes ☐ No
Only clean fill material would be discharged.

c. Is the discharge site adjacent to the extraction site and subject to the same sources of contaminants, or are the materials at the two sites substantially similar? ☐ Yes ☒ No

d. If there is a high probability that the material proposed for discharge is a carrier of contaminants, or are there constraints available that are acceptable to the permitting authority and the Regional Administrator to reduce potential con-

tamination to acceptable levels within the disposal site? ☐ Yes ☐ No

Not applicable. The material would be clean material and there is no reason to believe it would be a carrier of contaminants.

V. Disposal Site Determination 40 CFR § 230.11(f)

a. The following factors, as appropriate, have been considered in evaluating the disposal site.

1. Depth of water at the disposal site ☒
2. Current velocity, direction, and variability at disposal site ☒
3. Degree of turbulence ☒
4. Water column stratification ☒
5. Discharge vessel speed and direction *NA.* ☐
6. Rate of discharge ☒
7. Dredged material characteristics ☒
8. Other factors affecting rates and patterns of mixing ☒

b. An evaluation of the appropriate factors in V.a. above indicates that the disposal site and/or size of mixing zone is acceptable. ☒ Yes ☐ No

VI. Actions to Minimize Adverse Effects (Subpart H, 40 CFR § 230.70)

All appropriate and practicable steps would be taken, through application of recommentations of § 230.70 - 230.77, to ensure minimal adverse effects of the proposed discharge. ☒ Yes ☐ No

Actions taken:

VII. Findings of Compliance or Non-compliance (40 CFR § 230.12)

a. ☐ On the basis of these Guidelines (Subparts C through G), the proposed disposal site for discharge of dredged or fill material complies with the Section 404(b)(1) guidelines

b. ☒ On the basis of these Guidelines (Subparts C through G), the proposed disposal site for the discharge of dredged or fill material complies with the Section 404(b)(1) Guidelines with the inclusion of the appropriate and practicable discharge conditions to minimize pollution or adverse effects to the affected aquatic ecosystem. *See Attachment D for a complete list of conditions.*

c. ☐ The proposed disposal site for discharge of dredged or fill material does not comply with the Section 404(b)(1) guidelines for the following reasons:

1. There is a less damaging practicable alternative ..... ☐
2. The proposed discharge will result in significant degradation of the aquatic ecosystem..... ☐
3. The proposed discharge does not include all practicable and appropriate measures to minimize potential harm to the aquatic ecosystem ..... ☐
4. There does not exist sufficient information to make a reasonable

judgment as to whether the proposed discharge will comply with these Guidelines..... □

**PROJECT COMPONENT:
INFRASTRUCTURE
(ROADS, PIPELINES, BUILDING,
STRUCTURAL & MATERIAL STOCKPILING
PADS, BORROW PITS, POND BERMS, CREEK
DIVERSION DAM, PLUNGE POOL, SPILLWAY,
OTHERS)**

I. Evaluation of Compliance with 404(b)(1) Guidelines [restrictions on discharge, 40 CFR § 230.10(a)-(d)]

a. Alternatives Test. Refer to information discussed in the DSEIS, plus the Applicant's Section 404(b)(1) Evaluation, dated November 17, 2004, for additional references. Also, see the FSEIS, Section 2.3 (Project Components Studied in Detail, to incude 2.3.8 (Diversions and Storm water), 2.3.11 (Employee Housing and Transporation), 2.3.12 (Power Supply, 2.3.16 (Borrow Areas), and 2.3.17 (Roads and Bridges).

	Yes	No
(1) Is there a practicable alternative to the proposed discharge, which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences? (For this requirement practicable alternatives may include activities which do not involve discharges to waters of the U.S. or discharges at other locations in waters of the U.S.) *The applicant submitted a Practicability*	*15 ☐	☒

Analysis and a Cost Analysis breakdown for the proposed action, Alternative D, along with its respective alternative (described in POA-1990-592-2), also referred to as Alternative A. The Alaska Department of Natural Resources (ADNR) analyzed the practicability of the applicant's preferred alternative versus Alternative A, and determined[14] *that alternative A was neither practicable nor reasonable from the standpoint of cost or economics. The Corps reviewed these documents and other relevant information and independently determined that the previously authorized site was not practicable to the applicant due to cost and logistics, and that based on the similarities (location, logistics of material transport, construction and operation of the facility, etc) of the alternative variants of Alternative A (Alternatives A1 through A3), these three variations are also not practicable. All of the infrastructure items (listed above), with the exception of the creek diversion dam (which must be located in the creek in order to divert water), were designed to avoid placement in waters of the U.S. to the maximum extent practicable. Where placement in waters of U.S. was necessary, impacts were mini-*

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[14] ADNR Letter, dated December 1, 2004, addressed to the USFS.

mized to the maximum extent practicable.

(ii) If the project is in a special aquatic site and is not water dependent, has the applicant clearly demonstrated that there are no less environmentally damaging practicable alternative sites available? *The proposed project infrastructure components would be located primarily in wetlands, with the exception of the Mid Lake East Fork Slate Creek diversion dam which would be located within the creek channel. The creek channel is not a special aquatic site. The discharges for roads, building pads, and other infrastructure are not water dependent as they do not require access or proximity to or sitting in special aquatic sites in order to fulfill their basic purpose. The applicant considered other alternatives and clearly demonstrated that there were no practicable alternatives that were less damaging to the aquatic ecosystem. The applicant has also avoided and minimized to the maximum extent practicable. The Corps examined the proposed sites and all available information and determined that the sites for the infrastructure items would be the least environmentally damaging practicable alternative.*	* ☒	☐

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15 An * is marked above the answer that would indicate noncompliance with the Guidelines.

b. Special restriction. Will the discharge:
Refer to the Applicant's Section 404(b)(1) Evaluation, dated November 17, 2004, for additional references.

(i) Violate State water quality standards? [16] *The Alaska Department of Environmental Conservation (ADEC) has issued a Section 401 Water Quality Certification, dated May 6, 2005, which pertains to each of the 404 discharges. Also, see FSEIS Appendix A, Water Quality Analysis.*	* ☐	☒
(ii) Violate toxic effluent standards (under Section 307 of the Act)? *DSEIS: Section 4.6, Appendix A: Surface Water Quality. FSEIS: Appendix A - Water Quality Analysis.*	* ☐	☒
(iii) Jeopardize endangered or threatened species or their critical habitat? *DSEIS: Sections 4.10 and 4.11. FSEIS: Sections 4.10.3, and 4.11.2. Also, refer to attached Rod, discussion of comments received, with specificity to ESA consultation.*	* ☐	☒
(iv) Violate standards set by the Department of Commerce to protect marine sanctuaries? *NA. There are no marine sanctuaries on or near the project site.*	* ☐ NA	☐ NA

c. Other restrictions. Will the discharge contribute to significant degradation of "waters of the United States" through adverse impacts to:

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[16] ADEC letter to the Corps, dated December 6, 2004.

[*Refer to the Applicant's Section 404(b)(1) Evaluation, dated November 17, 2004, for additional references. Also, see the FSEIS: Appendix A, Water Quality Analysis.*]

	Yes	No
(i) Human health or welfare, through pollution of municipal water supplies, fish, shellfish, wildlife and special aquatic sites? *See DSEIS: Sections 4.8, Groundwater Quality; 4.6, Surface Water Quality; and 4.12, Soils, Vegetation, and Wetlands. FSEIS: Section 4.7.3, Groundwater Quality; 4.5.6, Surface Water Quality; 4.12.3, Wetlands.*	* ☐	☒
(ii) Life stages of aquatic life and other wildlife? *DSEIS: Sections 4.11, Wildlife; and 4.12, Soils, Vegetation, and Wetlands. Also, refer to Section XI of the ROD.*	* ☐	☒
(iii) Diversity, productivity and stability of the aquatic life and other wildlife or wildlife habitat or loss of the capacity of wetlands to assimilate nutrients, purify water or reduce wave energy? *DSEIS: Sections 4.6; 4.9; 4.11; and 4.12. FSEIS:4.9.6., 4.11.2., and 4.12.3.*	* ☐	☒
(iv) Recreational, aesthetic and economic values? *DSEIS: Sections 3.13 through 3.15; and 4.13 through 4.15. FSEIS: 4.13.3., 4.14.3., 4.15.3.*	* ☐	☒

d. Actions to minimize potential adverse impacts (mitigation). Will all appropriate and practicable steps (40 CFR § 230.70-77, Subpart H) be taken to minimize the potential adverse impacts of the discharge on the aquatic ecosystem? *[Refer to the Applicant's Section 404(b)(1) Evaluation, dated November 17, 2004, for additional references.] DEIS: Section 2.5. FSEIS: Section 2.5.1: Mitigation. For follow-up, refer to ROD, Section VII, Subpart G.*	☒	☐ *

II. Factual Determinations (40 CFR § 230.11)

The determinations of potential short-term or long-term effects of the proposed discharges of dredged or fill material on the physical, chemical and biological components of the aquatic environment included items a – h, below, in making a findings of compliance or non-compliance.

Subpart C: Potential Impacts on Physical & Chemical Characteristics of the Aquatic Ecosystem;

Subpart D: Potential Impacts on Biological Characteristics of the Aquatic Ecosystem;

Subpart E: Potential Impacts on Special Aquatic Sites; and

Subpart F: Potential Impacts on Human Use Characteristics.

Subpart G: Evaluation and Testing

There is potential for short-term or long-term adverse effects (in light of Subparts C-G, listed above) of the proposed discharge as related to:

	Yes	No
a. Physical substrate determinations *[FSEIS: Section 4.12.1; Appendix C].* *The vegetative substrate under the proposed structures is primarily emergent, scrub-shrub or forested wetlands, all of which would be mechanically land cleared prior to the deposition of fill to construct the required infrastructure.*	☒	☐
b. Water circulation, fluctuation and salinity determinations *[FSEIS: Section 3.6 thro. ,h 3.10; and Section 4.5.3 (Effects Common to Alternatives B, C, and D)]* *Few of the impacted wetlands have standing water which circulate. However, these same waters do respond (storage) to heavy periods of precipitation. The proposed discharges are conditioned to prevent substantial changes. These are freshwater systems, salinity determinations are not applicable.*	☒	☐
c. Suspended particulate/turbidity determinations *[See FSEIS, Section 4.6.4 (Effects Common to Alternatives B, C, and D), and Section 4.9 (Aquatic Resources: Freshwater).* *The permit would be conditioned to require stabilization of all disturbed soils in order to*	☒	☐

prevent erosion of disturbed sediments into waters of the U.S.

d. Contaminant determinations
[See FSEIS, Section 4.6.4 (Effects Common to Alternatives B, C, and D [Accidental Spills], and Section 4.6.6. through 4.6.7.) ☐ ☒
Only clean material would be discharged..

e. Aquatic ecosystem structure and function determinations
[FSEIS: Section 4.9 and 4.12] ☒ ☐
Modification of the area wetlands would result in the short-term modification of the area's aquatic ecosystem and functions. These would be restored upon project closure. A portion of the East Fork Slate Creek would be converted to deepwater habitat.

f. Proposed disposal site determination (disposal sites and/or size of mixing zone are acceptable) ☐ ☒
[FSEIS: Section 2, Description of proposed actions and other Alternatives].

g. Determination of cumulative effects on the aquatic ecosystem
[FSEIS: Sections 4.12, and 4.21 (Cumulative Effects)] ☐ ☒

h. Determination of secondary effects on the aquatic ecosystem
[FSEIS: Section 4.0] ☒ ☐
Secondary effects of the proposed discharges would include noise and air quality due to heavy equipment operation to construct the operation. As well as those impacts associated with the operation of the mine.

III. Technical Evaluation Factors 40 CFR § 230 Subparts C-F

a. Potential Impacts on Physical and Chemical Characteristics of the Aquatic Ecosystem (Subpart C) *FSEIS-Section 4.0 Environmental Impacts*	Ssignificant	Not significant
1. Substrate *[FSEIS: Sections 4.3 (Geology & Geochemistry) and 4.4 (Geotechnical Stability), Also, Section 2.3 (Project Components Studied in Detail].*	☐	☒
2. Suspended particulates/turbidity *[FSEIS: Section 4.5, and 4.9] Only clean material would be used and all fills would be required to be stabilized to minimize turbidity.*	☐	☒
3. Water *[FSEIS: Section 4.5 through 4.10]*	☐	☒
4. Alteration of current patterns and water circulation *[FSEIS: Section 4.5] There is little surface water present in the wetlands where the majority of the infrastructure components would be constructed. The diversion dam in Mid Fork East Slate Creek would result in water being piped below the tailings dam where it would reenter Slate Creek*	☐	☒

5. Alteration of Normal Water fluctuations/hydro period *[FSEIS: Sections 4.5 and 4.7].* *The Alaska Department of natural Resources, Office of Habitat Management and Permitting regulates water levels in Slate Creek which would result from releases of water below the proposed dam, and a permit has been issued to the applicant. The wetlands at the project site are not normally inundated.*	☐	☒
6. Alteration of salinity gradients *[FSEIS: Section 4.3]* *NA. The aquatic resources that would be impacted are freshwater.*	☐	☐

b Potential Impacts on the Biological Characteristics of the Aquatic Ecosystem (Subpart D)

7. Threatened and Endangered species (§ 230.30) *NA. There are no threatened or endangered species or their critical habitat within these portions of the project site.*	☐	☐
8. Aquatic Food Web (§ 230.31) *[FSEIS: Sections 4.9 & 4.10]* *The discharge of fill for construction of the infrastructure components would result in the elimination of the food web that these wetlands provide. After*	☐	☒

project these functions would be restored.

9. Other wildlife *[FSEIS: Section 4.11]. Construction and operation of the various infrastructure components would affect (e.g., limit travel) wildlife and waterfowl use of the area. This effect would be minimal due to the historic and current use of the site for mine operations. Upon project closure and reclamation of the site the use by wildlife would increase.* ☐ ☒

c Potential Impacts on Special Aquatic Sites (Subpart E)

1. Wetlands *[FSEIS: Sections 4.9 & 4.12]. The wetlands present at the project site include emergent, scrub-shrub and forested the infrastructure (roads, pipelines, borrow pits, structural pads) would result in the temporal loss of these wetlands. Upon project closure they would be restored.* ☐ ☒

2. *Sanctuaries* and refuges *[FSEIS: Section 4.11] NA. There are no sanctuaries or refuges in the project area.* ☐ ☐

3. Mud Flats – *NA. There are no mud flats in the project area.*	☐	☐
4. Vegetated Shallows – *NA. There are no vegetated shallows in this portion of the project area.*	☐	☒
5. Coral reefs – *NA. There are no coral reefs in the project area.*	☐	☐
6. Riffle and pool complexes [*FSEIS: Section 4.9*] – *NA. The infrastructure components would not be located in riffle / pool complexes.*	☐	☒

e Potential Effects on Human Use Characteristics (Subpart F)

Description of Social Environment [Base condition]: See FSEIS, Sections 4.0 Environmental Impacts, and 3.15 Socioeconomics.

1. Effects on municipal and private water supplies - *NA. The project would not impact municipal or private water supplies.*	☐	☐
2. Recreational and Commercial fishing impacts (including subsistence fishing) *FSEIS: Sections 4.15 & 4.20. NA. The creeks and other waters of the U.S. at the site are not subject to fishing,*	☐	☐

whether subsistence, recreational or commercial.

3. Effects on water-related recreation *[FSEIS: Section 4.13] NA. The area isolated from roads and has not been recorded as having any recreational values. The proposed discharges would not impact water related recreation.*	☐	☐
4. Aesthetics *[FSEIS: Section 4.14] The discharges would adversely impact the sites' aesthetic values. However, the impact is not substantial due to the isolation of the project area, and its historical use for mining.*	☐	☒
5. Effects on parks, National and historic monuments, National seashores, wilderness areas, research sites, and similar preserves. *NA. The project is not located in any of these areas.*	☐	☐

IV. Evaluation of Dredged or Fill Material (Subpart G, 40 CFR § 230.60)

c. The following information has been considered in evaluating the biological availability of possible contaminants in dredged or fill material: (checked boxes apply). *Section 2.3, Project Components Studied in Detail]*

8. ☒ Physical characteristics (receiving waters, bottom sediments, slurry constituents).
9. ☐ Hydrography in relation to known or anticipated sources of contaminants
10. ☐ Results from previous testing of the material or similar material in the vicinity of the project
11. ☐ Known, significant, sources of persistent pesticides from land runoff or percolation
12. ☐ Spill records for petroleum products or designated (§ 311 of CWA) hazardous substances
13. ☒ Other public records of significant introduction of contaminants from industry, municipalities or other sources
14. ☒ Known existence of substantial material deposits of substances which could be released in harmful quantities to the aquatic environment by man-induced discharge activities

b. An evaluation of the information above indicates that there is reason to believe the proposed dredged or fill material is not a carrier of contaminants, or that levels of contaminants are substantively similar at extraction and disposal sites. ☒ Yes ☐ No ☐ Unknown
Only clean material would be discharged.

c. Is the discharge site adjacent to the extraction site and subject to the same sources of contaminants, or are the materials at the two sites substantially similar? ☒ Yes ☐ No ☐ Unknown

d. If there is a high probability that the material proposed for discharge is a carrier of contaminants, or are there constraints available that are acceptable to the permitting authority and the

Regional Administrator to reduce potential contamination to acceptable levels within the disposal site? ☐ Yes ☐ No
Only clean material would be discharged.

V. Disposal Site Determination 40 CFR § 230.11(f)

The following factors, as appropriate, have been considered in evaluating the disposal (discharge) sites.

1. Depth of water at the disposal site ☒
2. Current velocity, direction, and variability at disposal site ☒
3. Degree of turbulence ☐
4. Water column stratification ☐
5. Discharge vessel speed and direction ☐
6. Rate of discharge ☐
7. Dredged material characteristics ☒
8. Other factors affecting rates and patterns of mixing ☒

d. An evaluation of the appropriate factors in V.a. above indicates that the disposal site and/or size of mixing zone is acceptable. ☒ Yes ☐ No

VI. Actions to Minimize Adverse Effects (Subpart H, 40 CFR § 230.70)

All appropriate and practicable steps would be taken, through application of recommendations of § 230.70 - 230.77, to ensure minimal adverse effects of the proposed discharge. ☒ Yes ☐ No

Actions taken: Inclusion of Best Management Practices in the Mining Plan of Operations (POO), DA Permit Special Conditions to include incorporation of the Mining POO, inclusive of reclamation appen-

dix. See Attachment D to the ROD, for a list of Special Conditions to be appended to the Corps (DA) permit. State and local permits have been conditioned to reduce impacts resulting from the material discharge into waters of the United States, including wetlands, for the supporting mining infrastructure (embankment, plunge pool, spillway, water treatment facility pad, etc).

VII. Findings of Compliance or Non-compliance (40 CFR § 230.12)

a. ☐ On the basis of these Guidelines (Subparts C through G), the proposed disposal site for discharge of dredged or fill material complies with the Section 404(b)(1) guidelines

b. ☒ On the basis of these Guidelines (Subparts C through G), the proposed disposal site for the discharge of dredged or fill material complies with the Section 404(b)(1) Guidelines with the inclusion of the appropriate and practicable discharge conditions to minimize pollution or adverse effects to the affected aquatic ecosystem. See Attachment D for a complete list of Special Conditions to be attached to the permit.

c. ☐ The proposed disposal site for discharge of dredged or fill material does not comply with the Section 404(b)(1) guidelines for the following reasons:

1. There is a less damaging practicable alternative ☐

2. The proposed discharge will result in significant degradation of the aquatic ecosystem ☐
3. The proposed discharge does not include all practicable and appropriate measures to minimize potential harm to the aquatic ecosystem ☐
4. There does not exist sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with these Guidelines. ☐

APPENDIX S

Department of Army, Corps of Engineers

Alaska District

Section 404(b)(1) Evaluation
and
Public Interest Review

Cascade Point Docking Facility
POA-1997-245-N

I. INTRODUCTION

Goldbelt, Incorporated (Goldbelt) has requested authorization for the discharge of dredged and/or fill material in waters of the United States (U.S.) under Section (§) 404 of the Clean Water Act (CWA), and for work in, on, over or under navigable waters of the U.S. under §10 of the Rivers and Harbors Act (RHA) of 1899, for construction of a docking facility to improve access to their property located at Echo Cove/Cascade Point. The evaluation requirements of Section 404 CWA are within the guidelines developed by the Administrator of the EPA in conjunction with the Secretary of the Army, published in 40 Code of Federal Regulations (CFR), Part 230, and referred to as the Section 404 (b)(1) Guidelines[1] (Guidelines). This Section 404(b)(1) evaluation and public interest review addresses the potential impacts of the discharge of dredged and/or fill material into waters of

[1] 40 CFR 230

the U.S. by Goldbelt. This document will be attached to, and become a part of, the Corps Record of Decision for the Kensington Mine and Cascade Point projects.

The proposed project and its related impacts were described in the U.S. Forest Service's (USFS) Cascade Point Final Environmental Impact Statement (FEIS), dated March 10, 1998, which was for an access road and a marine terminal docking facility to be constructed on USFS and Goldbelt property, and later in the Corps' combined decision document/environmental assessment (EA), dated June 12, 1998. The project and its related environmental impacts, was again discussed in the Draft Supplemental Environmental Impact Statement (DSEIS) for the Coeur Alaska, Incorporated, (Coeur) Kensington Gold Project[2]. This DSEIS was prepared by Tetra Tech, Incorporated, for the USFS, January 23, 2004, and described Cascade Point as one of several potential destination docking facilities for the transport (ferry shuttles) of the Kensington mining personnel, and it was discussed more recently in the Final Supplemental Environmental Impact Statement (FSEIS), dated December 2004, for the Kensington Gold Project. These above referenced documents[3] included a complete project impact analysis and review

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[2] POA-1990-592-M, Kensington Gold Mine Project

[3] The USFS' EIS, DEIS and the FSEIS are all available at the USFS, 8465 Old Dairy Road, Juneau, AK 99801. A copy of each was referenced, and incorporated into the case file. These as well as the other referenced documents are available for viewing at the Corps of Engineers, Suite 106, 8800 Glacier Highway, Juneau, Alaska 99801.

of the direct, secondary, and cumulative, impacts of the project, as well as pertinent alternatives. The previous Corps decision documents are at Attachment F of the ROD, and the relevant portions of the 1998 Cascade....

* * * * *

See also the original Corps' Combined Permit Evaluation and Decision Document, dated June 12, 1998, Section F, Cumulative Impacts.

NMFS Recommendation #5: NMFS stated in their letter that the proposed project "...may affect endangered humpback whales, threatened Stellar sea lions which are protected from harm under the ESA, and may harm other marine mammals what are afforded protection from harm under the Marine Mammal Protection Act." NMFS requested that the Corps begin consultation with NMFS pursuant to Section 7 of the Endangered Species Act (ESA), stating that the original Biological Opinion prepared by the Corps for the original permit application by Goldbelt was outdated and should be revised with new information specific to Berners Bay.

Corps Response to NMFS: The Corps initiated informal consultation on June 21, 2004, pursuant to Section 7 of the ESA, with the NMFS, and later, jointly with the USFS on November 16, 2004, requested formal consultation by submitting a Biological Assessment/Biological Evaluation (BABE) stating that both agencies had jointly determined that the project was not likely to adversely affect threatened and endangered species (humpback whale and Stellar sea lions) within the project area.

The NMFS acknowledged receipt of the joint request for formal consultation pursuant to Section 7 of the

ESA, stating that they had reviewed the BABE, and disagreed with the conclusion. However, on March 18, 2005, the NMFS completed their Biological Opinion, and recommended denial of the Cascade Point project and included 16 Conservation Recommendations. These are addressed below.

Comment dated September 13, 2004. The NMFS referenced their earlier comments of August 19, 2004, reiterating that the Corps should prepare an EFH assessment and initiate consultation under the ESA. The NMFS again recommended denial of the permit referencing Part IV, 3(b) of the MOA between the Corps and the Department of Commerce.

Corps Response to NMFS: See the Corps response to the NMFS' Recommendations #1 and #5, Comment dated August 19, 2004, above.

National Marine Fisheries Service, Protected Resources Division, Endangered Species Act (ESA) Consultation Process:

The Corps initiated informal consultation pursuant to Section 7 of the ESA, with the NMFS, and later, jointly with the USFS, formal consultation and submitted a Biological Assessment/Biological Evaluation (BABE) stating that both agencies had determined that the project was not likely to adversely affect threatened and endangered species (humpback whale and Stellar sea lions) within the project area.

Comment dated December 3, 2004. The NMFS acknowledged receipt of the joint request for formal consultation pursuant to Section 7 of the ESA, stating that they had reviewed the BABE, and disagreed with the conclusion of the Corps and the USFS. The letter went on to discuss several factors which NMFS felt were of importance: regularity of shuttle transit

of the bay, vessel speed, construction of a dock at Cascade Point (Goldbelt application) and at Slate Creek Cove (Kensington application), and the usage of these facilities by members of the public. NMFS recommended looking for an alternative site to the Cascade Point site, and suggested the suspension of vessel traffic within Berners Bay at pre-selected dates and times. NMFS stated in their letter "during formal consultation, Federal action agencies may not make any irreversible or irretrievable commitment of resources that limits future options. This practice insures that agency actions do not preclude the formulation or implementation of reasonable and prudent alternatives that avoid jeopardizing the continued existence of T&E species or destroying or modifying their critical habitats."

Comment dated March 18, 2005. The NMFS completed their Biological Opinion (BO) and also included 16 Conservation Recommendations, which are addressed below.

The BO concluded with the following:

(a) "...the proposed action is not likely to jeopardize the continued existence of the western population of Steller sea lions."

(b) "...the proposed action is not likely to jeopardize the continued existence of the eastern population of Steller sea lions."

(c) "...the proposed action is not likely to jeopardize the continued existence of the Central North Pacific population of humpback whales."

However, the BO also concluded that individual Steller sea lions and individual humpback whales in the project area might be adversely affected, since

the project site would be located within the known or historic range of these mammals.

The referenced "proposed action" stated in the BO is the work associated with the Plan of Operations (POO) for the Kensington Gold Mine project. The POO addresses the use of Cascade Point as a marine docking facility only as a mine crew shuttle embarkation/debarkation point, and to be used for no other stated purpose. For this reason, the BO did not address other uses to which the marine docking facility might be put to in the future,. such as tourism, commercial transport, log transfer facility, personal usage, etc. See Consideration of Comments, National Marine Fisheries Service, below.

Denial Recommendation. The NMFS stated, on page 128 of their BO, their continued recommendation that Goldbelt seek an alternative location to the Cascade Point facility, preferably outside of Berners Bay.

Corps Response to ESA: The Corps has determined that the current proposal is the least environmentally damaging, practicable alternative. See Section VI Alternative Analysis, above.

Recommendation #1. "Any crew shuttle transits across Berners Bay during the eulachon run and herring spawning periods of April and May should be suspended. NMFS recommends use of other transportation routes during this time to minimize adverse effects listed species and their prey base." Also, "...that Coeur limit disturbance from vessel noise, lights, and other sources that may discourage herring from utilizing spawning habitat in the vicinity of Cascade Point."

Corps Response to ESA: The timing and routing of the Kensington mine shuttle vessels transiting

Berners Bay are addressed in the Berners Bay Transportation Policy and Mitigation and Best Management Practices Plan, prepared by Coeur Alaska (2005). See Goal #5 of the Plan. The Plan has been incorporated into, and is a part of the Final Plan Of Operations for the Kensington Gold Project, dated May 2005, Appendix 4-C, and is enforceable by the USFS. The USFS's Final Plan of Operations has been incorporated as a condition of the Kensington Mine permit.

Recommendation #2. "Fueling of vessels at the Cascade Point marine docking facility should be prohibited from the time pre-spawning aggregations of herring are observed around the dock facility until herring eggs have hatched."

Corps Response to ESA: The U.S. Forest Service's Mining Plan of Operations addressed fueling of vessels at this facility for the Kensington Gold Mine Project. Also, the state's Submerged Lands Permit carries conditions pertinent to the storage of fuel as well as fueling operations at Cascade Point. Vessel fueling of the Kensington mine shuttle at the Cascade Point marine facility is addressed in the Berners Bay Transportation Policy and Mitigation and Best Management Practices Plan, prepared by Coeur Alaska (2005). See Goal #5 of the Plan. The Plan has been incorporated into, and is a part of the Final Plan of Operations for the Kensington Gold Project, dated May 2005, Appendix 4-C, and is enforceable by the USFS. The USFS's Final Plan of Operations has been incorporated as a condition of the Kensington Mine permit.

Recommendation #3. "Dock facilities should serve only the Kensington Gold Project and public or other private uses should be entirely restricted in order to

protect and avoid additional cumulative impacts to marine mammal populations in Berners Bay."

Corps Response to ESA: The City & Borough of Juneau Conditional Use Permit restricts use of the dock to Kensington Mine Shuttle operations. It should be recognized that the structure, if constructed, would provide a safe haven in the event of a storm event, and its use at that time or under similar circumstances by members of the public should not be restricted.

Recommendation #4. "Construction should not occur between March 15 and June 30 to minimize potential noise impacts to marine mammals." And, "NMFS recommends that near-water construction occur during winter months when fewer marine mammals are present."

Corps Response to ESA: The following special condition will be incorporated into the Corps permit, if authorized:

> *No in-water construction work shall occur in Berners Bay between March 15 through June 30, to protect juvenile salmonids, herring, eulachon, and marine mammals.

Recommendation #5. "NMFS recommends the use of appropriate in-water noise control measures (e.g., mufflers, bubble curtains) or other technology for construction equipment and activities to minimize the effects of construction noise. NMFS also recommends the use of the additional noise reduction measures described in the BA/BE (e.g., instituting speed limits, controlling helicopter altitudes, implementing flight path requirements, refraining from compression braking on haul roads from the Slate Creek Dock to the mining site).

Corps Response to ESA: See Corps Response to Recommendation number 6, below. The placement of structures into waters of the U.S. and the control of helicopter and/or vessel operations, to include route selection, vessel fueling, flight altitudes, speed limits, as well as in-water noise control measures are addressed in the Berners Bay Transportation Policy and Mitigation and Best Management Practices Plan, prepared by Coeur (2005), Goal #5 SOP #11 and SOP #12. The Plan has been incorporated into, and is a part of the Final Plan of Operations for the Kensington Gold Project, dated May 2005, Appendix 4-C, and is enforceable by the USFS. The USFS's Final Plan of Operations has been incorporated as a condition of the Corps permit. The operational control for vehicle speeds, braking procedures, and noise, as well as other noise sources, including blasting are controlled through the USFS Plan of Operation.

Recommendation #6. "In-water construction should occur outside of appropriate timing windows that protect out migrating juvenile salmonids, and spawning and rearing marine forage fish." And, "...we also recommend using vibratory hammers whenever and wherever practicable except for the final few minutes needed to proof piles when an impact hammer must be used."

Corps Response to ESA: The following special conditions will be incorporated into the Corps permit, if authorized:

> *All steel piles shall be driven using a vibratory hammer. Under those conditions where impact hammers are required for reasons of seismic stability or substrate type, the piles shall be driven as deep as possible with a vibratory hammer prior

to the use of the impact hammer. The impact hammer shall be used at a time of year when larval and juvenile stages of fish species are not present: this will be coordinated with the Alaska Department of Natural Resources, Habitat.

*All piles shall be driven when the current is reduced (i.e., centered on slack current) to minimize the number of fish exposed to adverse levels of underwater sound.

*Permittee shall either use a block of wood between the impact hammer and the pilings, and/or use a bubble curtain to attenuate the sound.

Recommendation #7. "As included in the USFS SEIS' Best Management Practices, NMFS recommends the use of silt curtains or other methods to prevent sedimentation of coastal habitat areas from construction activities."

Corps Response to ESA: The following special condition will be incorporated into the Corps permit, if authorized:

*Silt curtains or other appropriate methods shall be used to confine suspended particles and turbidity to a small area where settling can occur at the docking facility construction site (see 40 CFR 230.73(c)), and may include baffles to decrease turbulence and increase retention time or a filter blankets and curtains to filter out suspended solids.

Recommendation #8. "A marine biologist should monitor construction activities' effects on marine mammal behavior to ensure that impacts on marine mammals will be minimal. Monitoring results should be submitted to NMFS and USFS annually to determine if protection requirements have been met."

Corps Response to ESA: The request of having a marine biologist monitoring marine mammal behavior is addressed in the Berners Bay Transportation Policy and Mitigation and Best Management Practices Plan, prepared by Coeur (2005). See Goal #5 of the Plan. The Plan has been incorporated into, and is a part of the Final Plan Of Operations for the Kensington Gold Project, dated May 2005, Appendix 4-C, and is enforceable by the USFS. The USFS's Final Plan of Operations has been incorporated as a condition of the Kensington Mine permit.

Recommendation #9. "Vessel traffic should be minimized after dark, especially during spring eulachon/herring runs when Stellar sea lions and humpback whales are most likely to be foraging near the surface and along the route of the crew shuttle, increasing the likelihood of disturbance to both predators and prey from vessel noise and presence."

Corps Response to ESA: The timing and routing of shuttle vessels transiting Berners Bay are addressed in the Berners Bay Transportation Policy and Mitigation and Best Management Practices Plan, prepared by Coeur Alaska (2005). See Goal #5 of the Plan. The Plan has been incorporated into, and is a part of the Final Plan of Operations for the Kensington Gold Project, dated May 2005, Appendix 4-C, and is enforceable by the USFS. The USFS's Final Plan of Operations has been incorporated as a condition of the Kensington Mine permit.

Recommendation #10. "Vessels should be operated year-round at speeds not exceeding 13 knots."

Corps Response to ESA: Vessel operations in Berners Bay are addressed in the Berners Bay Transportation Policy and Mitigation and Best Management Practices Plan, prepared by Coeur Alaska (2005). See

Goal #5 of the Plan. The Plan has been incorporated into, and is a part of the Final Plan of Operations for the Kensington Gold Project, dated May 2005, Appendix 4-C, and is enforceable by the USFS. The USFS's Final Plan of Operations has been incorporated, as a condition of the Kensington Mine permit.

Recommendation 11. "Quieting techniques should be adapted to vessels associated with the Kensington Gold Project, particularly the crew shuttle, to minimize noise disturbance to listed species and their prey in the action area."

Corps Response to ESA: Quieting techniques is addressed in the Final Plan of Operations for the Kensington Gold Project, dated May 2005, Appendix 4-C, and is enforceable by the USFS. The USFS's Final Plan of Operations has been incorporated as a condition of the Kensington Mine permit. Also, see the Corps response to Recommendation 5, above.

Recommendation #12. "As the proposed action increases vessel traffic in an area where disturbance and collision risk have been minimal in the past, NMFS recommends that vessel-operating procedures be monitored and evaluated to determine if they are effective at protecting sea lions and whales in the waters of Berners Bay."

Corps Response to ESA: The monitoring of vessels' operations transiting Berners Bay is addressed in the Berners Bay Transportation Policy and Mitigation and Best Management Practices Plan, prepared by Coeur Alaska (2005). See Goal #5 of the Plan. The Plan has been incorporated into, and is a part of the Final Plan of Operations for the Kensington Gold Project, dated May 2005, Appendix 4-C, and is enforceable by the USFS. The USFS's Final Plan of

Operations has been incorporated as a condition of the Kensington Mine permit.

Recommendation #13. "NMFS recommends that a marine mammal observer monitor crew shuttle operations during the entire year, beyond simply the April/May time period, to ensure that impacts on marine mammals are minimized and properly mitigated. Monitoring results should be submitted to NMFS and USFS annually to determine if protection requirements have been met."

Corps Response to ESA: The presence of a trained observer on or monitoring of vessels transiting Berners Bay is addressed in the *Berners Bay Transportation Policy and Mitigation and Best Management Practices Plan*, prepared by Coeur (2005), Goal #5, SOP #4 and SOP #7. The Plan has been incorporated into, and is a part of the Final Plan of Operations for the Kensington Gold Project, dated May 2005, Appendix 4-C, and is enforceable by the USFS. The USFS's Final Plan of Operations has been incorporated as a condition of the Kensington Mine permit.

Recommendation #14. "NMFS recommends that USFS and ACOE [Corps] should complete the spill prevention, control, and containment plan for approval by NMFS and other relevant agencies that addresses the potential for catastrophic spill (i.e., in the event that a 6,500 diesel fuel isotainer was to leak or rupture during transport, loading, or offloading)."

Corps Response to ESA: EPA amended the Oil Pollution Prevention regulation at Title 40 of the Code of Federal Regulations, Part 112, (40 CFR 112). The regulation incorporated revisions proposed in 1991, 1993, and 1997. Subparts A through C of the Oil Pol-

lution Prevention regulation are often referred to as the "SPCC rule" because it describes the requirements for certain facilities to prepare, amend and implement Spill Prevention, Control and Countermeasure (SPCC) Plans.

The regulation requires that all regulated facilities have a fully prepared and implemented Spill Prevention, Control, and Countermeasure, or SPCC Plan. A licensed professional engineer must certify the SPCC Plan. Facilities must implement the Plan, including carrying out the spill prevention and control measures established for the type of facility or operations, such as measures for containing a spill (e.g., berms). In the event that a facility cannot implement containment measures, the facility must demonstrate that secondary containment is impracticable; conduct periodic integrity and leak testing of bulk containers and associated valves and piping; develop and incorporate a strong spill contingency plan into the SPCC Plan; and provide a written commitment of manpower, equipment, and materials required to quickly remove any quantity of oil discharged that may be harmful. In addition, facility owners or operators must conduct employee training on the contents of the SPCC Plan. Facilities that become operational between August 17, 2002 and August 18, 2006 must prepare and implement an SPCC Plan by August 18, 2006. Facilities that become operational after August 18, 2006, must prepare and implement a Plan before beginning operations.

Therefore, since preparation and implementation of a SPCC plan is the responsibility of the facility operator (Coeur or Goldbelt), with oversight provided by the USEPA, the Corps permit will not carry this

condition separately. The Corps will supply an advisory to the permittee.

Recommendation #15. "...NMFS recommends that monitoring be directed toward adaptive management. We further recommend that our agency and other natural resource agencies be able to independently review collected data to assess impacts. If impacts are detected from project activities, USFS and ACOE should consult with NMFS to determine how to adjust the action effectively."

Corps Response to ESA: The Corps will conduct normal monitoring of permit compliance in the project area, but will not be actively conducting any additional requested monitoring studies in the project area. Second, it is understood that most if not all of the proposed actions associated with the Cascade Point Marine Docking Facility would result in impacts,-whether to the physical, social and/or biological environment, and these have been discussed in the FSEIS, along with the means to mitigate for them. Also, several Federal and State resource agencies will be conducting monitoring activities at the project site and within Berners Bay. If adverse impacts different than those already discussed and mitigated for are detected, the Corps will coordinate corrective efforts with all appropriate Federal, State and local resource agencies.

Recommendation #16. "...NMFS recommends that Coeur support such research efforts in the action area throughout the course of the Kensington Gold Project, and use best available technology to design any breakwater structure so that the probability of recreating productive herring spawning habitat is maximized."

Corps Response to ESA: The current breakwater design for both the Goldbelt and the Kensington projects have been submitted and published in the Corps' public notices for public review and have not generated any negative responses with respect to its habitat potential (e.g., herring, kelps and fucus, bivalves, echinoderms, crustaceans).

e. U.S. Coast Guard [USCG]: The USCG requested that Goldbelt affix "a Flashing six second white light (FL 6s) on top of the outermost portion of the rubble mound..." See Consideration of Comments, below.

STATE AND LOCAL AGENCIES:

Alaska Department of Natural Resources, Habitat Division [ADNR-H] did not comment to the Corps: ADNR-H was a cooperating agency to the USFS' EIS, and commented directly to and coordinated with the USFS, on issues pertaining to habitat concerns respective to both the Kensington Gold Project and to Goldbelt's proposed marine docking facility. This coordination resulted in conditioning of the State of Alaska Tidelands permit and the State of Alaska Habitat permits. Additionally, issues and/or concerns raised by ADNR-H were also addressed in the USFS' FSEIS, Chapter 4.

Though the Alaska Department of Natural Resources, Division of Parks and Outdoor Recreation, Office of History and Archaeology [SHPO] did not comment to the Corps, and though SHPO did not relate any issues pertaining to impacts to aquatic resources to the Corps, SHPO related issues pertaining to Cascade Point were addressed in Chapter 4 of the USFS' FSEIS.

The City and Borough of Juneau (CBJ) issued a Conditional Use Permit to Goldbelt, Inc., with sev-

eral conditions. The conditions of special interest to the Corps are listed as follows:

> #1. No vessel fueling is authorized to occur at this location except vessels used for transporting mineworkers to the Slate Creek Cover marine docking facility and craft necessary for facility operation and maintenance, including fuel spill responsibilities.
>
> #15. Coeur-Alaska will prepare and implement a Spill Response Plan for Cascade Point as identified in their September 2004 Berners Bay Transportation Policy and Mitigation and Best Management Practices Plan, as Standard Operating Procedure.
>
> #13. A draft plan will be circulated to Federal and state agencies with responsibility for water quality and spill prevention and response, and to the CBJ, for review. Coeur shall implement a final plan before docking facility operations begin.
>
> #17. Fueling will take place at a U.S. Coast Guard approved facility outside of Berners Bay between April 15 and May 15 each year when herring are observed spawning within 250 meters of the marine docking facility. The distances shall be clearly marked on the shoreline. A qualified observer whose salary and expenses shall be reimbursed by Goldbelt will determine the presence of spawning herring.

ORGANIZATIONS

Lynn Canal Conservation, Inc. [LCC]. See the Corps response to these issues below.

The LCC stated their opposition to the proposed changes to the Kensington Mine Project. This in-

cluded "harm to public interest natural resources; failure to adequately address cumulative (past, present and future) impacts; and piece-mealing of the mine-related activities, excluding potential impacts that might result if mining were to be extended for a greater period. LCC contended that the Corps' permit, if authorized, would authorize Goldbelt to construct an industrial port facility in Slate Creek Cove, and authorize Goldbelt, Inc., to construct a similar facility at Cascade Point. LCC also stated their opposition to "Federal approval of the disposal of processed mining waste into waters of the United States.

Southeast Alaska Conservation Council [SEACC). See the Corps response to these issues, below.

SEACC commented to the intention of Goldbelt to construct an "industrial-sized moorage facility" at Cascade Point, and that the Corps public notice was premature since the USFS had not yet approved any modifications to the Plan of Operations for the Kensington Mine. They were also concerned that the Corps had not entered into consultation pursuant to the Endangered Species Act (ESA), nor had the Corps adequately considered the cumulative impacts of all of the projects currently under consideration for the Berners Bay area, to include the Corps authorized Goldbelt road, and the proposed access road. SEACC went on to request that the Corps publish a second public notice to address the proposed docking facility, the Cascade Point access road, and all other structures on Goldbelt's master plan, to include all upland structures.

SEACC also addressed the potential for Goldbelt to use the facility at Yankee Cove as an alternative to constructing a ....

* * * * *

Water quality impacts associated with certain petroleum products, with emphasis on polycyclic aromatic hydrocarbons (PAHs).

Potential contamination from PAH originating from creosote piling has been mitigated for by use of steel piling. See also responses to ESA recommendations 2 and 14 above.

"The proposed project is part of a series of interrelated activities planned by Goldbelt . . . in conjunction with reasonably foreseen development of homes and businesses, daily commuter ferry service, mining and road building . . .", NMFS requested a comprehensive environmental impact statement to address these 'foreseeable' actions and related impacts.

See the original Corps' Combined Permit Evaluation and Decision Document, dated June 12, 1998, Section F, Cumulative Impacts, and the 2004 FSEIS cumulative impact analysis.

The following conditions were included in the Alaska Department of Environmental Conservation's (ADEC) Certificate of Reasonable Assurance:

1. Petroleum spill response equipment and supplies shall be available at the marine docking facility to contain and clean up any fuel spills which may occur during the construction or operation phase.

2. The wooden portions of the docking facility docking shall not be treated with a preservative containing pentachlorophenol and if treated with creosote, the creosote shall be applied via pressure treatment that inhibits leaching at a rate that causes a sheen to form on the water.

3. Restroom and solid waste containment facilities shall be made available and maintained at the marine docking facility during the construction operation phases.

4. The dredging activity and spoils barge shall be enclosed within a silt curtain during dredging and spoils dewatering activity. If during dredging a silt plume is produced, dredging shall cease until the problem is resolved. Runoff resulting from dewatering the spoils or storing the spoils on uplands shall be directed into the enclosed area. The silt curtain shall extend a minimum of 20' below the surface at high tide. The structure shall remain until the silts have settled from the enclosed waters.

5. During breakwater construction, Goldbelt shall limit the introduction of silts into the marine waters. This can be done by utilizing fill clean of all silts and organics or by enclosing and isolating the fill area prior to fill placement with a silt curtain or similar structure. The silt curtain shall extend a minimum of 20' below the surface at high tide. The structure shall remain until the silts have settled from the enclosed waters."

(a)	Based on the discussion above, are there available, practicable alternatives having less adverse impact on the aquatic ecosystem and without other significant adverse environmental consequences that to not involve discharges into "waters of the U.S." or at other locations within these waters?	*	___ YES X NO
(b)	Based on above, if the project	NA	___

	YES	NO
is in a special aquatic site and is not water dependent, has the applicant clearly demonstrated that there are no practicable alternative sites available?		

Alternative Test:

Special Restriction. Will the discharge:

(a)	Violate state water quality standards?	* YES	NO
(b)	Violate toxic effluent standards [under Section 307] of the Clean Water Act?	* YES	X NO
(c)	Jeopardize endangered or threatened species or their critical habitat?	* YES	X NO
(d)	Violate standards set by the Department of Commerce to protect marine sanctuaries?	* YES	X NO
(e)	Evaluation of the information above, indicates that the proposed discharge material meets the testing exclusion criteria for the following reasons:	X YES	* NO

[x] Based on the above information, the material is not a carrier of contaminants.

Other restrictions: Will the discharge contribute to significant degradation of "waters of the U.S." through adverse impacts to:

(a) Human health or welfare, through pollution of municipal water supplies, fish, shellfish, wildlife and/or special aquatic sites?	* ___ YES	X NO
(b) Life stages of aquatic life and/or wildlife?	* ___ YES	X NO
(c) Diversity, productivity, and stability of the aquatic life and other wildlife? Or wildlife habitat or loss of the capacity of wetlands to assimilate nutrients, purify water or reduce wave energy?	* ___ YES	X NO
(d) Recreational, aesthetic, and/or economic values?	* ___ YES	X NO
Actions to minimize potential adverse impacts [mitigation]? Will all appropriate and practicable steps [40 CFR 230.70-77] be taken to minimize adverse impacts of the discharge on the aquatic ecosystem?	X YES	* ___ NO

In accordance with 33 U.S.C. 1341(d), all conditions of ADEC's Certification are incorporated as part of the DA permit. Therefore, they are not listed as special conditions. ADEC's condition number 4 is required to meet the DA public interest criteria.

The following special conditions would also be added to the DA permit. Several of the following conditions are similar to those on the ADEC Certification and

are being carried here because we feel strongly that these conditions should be carried on the Corps permit for the life of the project, whereas the conditions on the ADEC certificate could be modified when the certificate is renewed.

1. The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

* * * * *

11. The size of the fill footprint shall be restricted to minimize adverse environmental impacts to the Berners Bay ecosystem. Fill in the sub-tidal areas would be detrimental to marine fish rearing habitat and potentially could result in the declines of fish populations in nearby waters. Placing fill at low tides reduces the impacts of sedimentation on the marine ecosystem.

12. Although piling-supported structures will allow continued use of the project sites by many vertebrates and fish, much of the existing plant life is likely to be shaded and thereby lost. Therefore, in order to minimize this loss, the permittee shall use metal grating as a top surface, rather than planking, as this results in greater light

transmission to aquatic plants. Light penetration is needed to maintain intertidal habitat beneath structures such as walkways, catwalks, and gangways.

13. No portion of any floating structure may ground at any tidal stage. This is necessary to protect water quality and aquatic habitat by minimizing disturbance and introduction of suspended sediment, petroleum products, and toxic substances into the cove and outside waters.

14. Wooden surfaces of the structures that come into contact with the water shall not be painted or otherwise surface-treated with creosote and may not be treated with a preservative that contains pentachlorophenol. Creosote and pentachlorophenol are toxic to juvenile fish in marine waters.

15. No in-water construction work shall occur in Berners Bay between March 15 through June 30. This condition in necessary to protect juvenile salmonids, herring, eulachon and marine mammals.

16. Silt curtains or other appropriate methods shall be used to confine suspended particles and turbidity to a small area where settling can occur (see 40 CFR 230.73[c]). Other methods include: baffles to decrease turbulence and increase retention time; and filter blankets and curtains to filter out suspended solids.

17. The placement of fill material into marine waters shall only occur during low-water periods.

19. Your use of the permitted activity must not interfere with the public's right to free navigation on all navigable waters of the United States.

19. No in-water construction work shall occur in Johnson Creek May 1 through October 1, in order to direct construction to low-flow periods.

20. Permittee shall insure that all accumulated sediment is removed from the breakwater breach.

General Evaluation. [33 CFR 320.4(a)].

APPENDIX T

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

SOUTHEAST ALASKA CONSERVATION COUNCIL; SIERRA CLUB; and LYNN CANAL CONSERVATION,

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; COLONEL TIMOTHY J. GALLAGHER, in his official capacity as District Engineer; LARRY L. REEDER, in his official capacity as Chief of the Regulatory Branch; DOMINIC IZZO, in his official capacity as Principal Deputy Assistant Secretary of the Army (Civil Works); and UNITED STATES FOREST SERVICE,

Defendants.

Case No. J05-00012 CV (JKS)

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (5 U.S.C. §§ 702, 706(a)(A); 33 U.S.C. §§ 1311, 1316, 1342, 1344; 16 U.S.C. §§ 528-31, 551, 1600-14)

INTRODUCTION

1. This action challenges the final decision of Defendant United States Army Corps of Engineers (Corps) to issue a section 404 permit under the Clean Water Act, 33 U.S.C. § 1344, for the disposal of 4.5 million tons of mine waste into a lake in connection with the Kensington Gold Project. It also challenges the final decision of the United States Forest Service approving the mining company's plan of operations and a second Corps' section 404 permit for the construction a marine terminal facility at Cascade Point, both of which depend on the Kensington section 404 permit.

2. The Kensington Gold Project is a proposed gold mine located near Juneau, Alaska. Coeur Alaska, Inc., a wholly-owned subsidiary of Coeur D'Alene Mines Corporation, seeks to develop the mine. As part of the proposal, Coeur Alaska intends to discharge, on average, 210,000 gallons per day of untreated, processed mine waste (mine tailings) into a freshwater lake, Lower Slate Lake, through a 3.5-mile pipeline. Ultimately, these discharges will deposit 4.5 million tons of mine tailings in the lake.

3. On June 15, 2005, the Corps signed the section 404 permit authorizing this discharge on the ground that the processed mine waste constitutes "fill material." On November 22, 2005, the Corps suspended the permit to re-evaluate its decision. On March 29, 2006, the Corps reinstated the identical permit.

4. Lower Slake Lake is a sub-alpine lake with a surface area of approximately 20 acres. It is situated on public lands within the Tongass National Forest on a relatively flat, south-facing terrace in the middle portion of the East Fork Slate Creek watershed. Slate Creek contains a variety of fish species, including coho, pink and chum salmon, Dolly Varden char, and cutthroat trout. Lower Slate Lake is surrounded by steep coniferous forested lands and rare and important lacustrine and palustrine emergent wetlands. Lower Slate Lake supports fish populations, including about 1,000 Dolly Varden char. There is no historical mine-related disturbance in the Slate Creek watershed.

5. Lower Slate Lake (elevation 650 feet) is connected to Slate Creek, which feeds into Berners Bay approximately 2 miles downstream. Berners Bay is one of Southeast Alaska's exceptional resources. Situated along the east side of Lynn Canal, Berners Bay provides outstanding biological resources and recreational opportunities for boaters, fishers, hunters, and wildlife viewers. The bay and the rivers that feed into it provide spawning and rearing habitat for runs of eulachon; sockeye, coho, pink, and chum salmon; steelhead and cutthroat trout; and Dolly Varden char. Every spring, eulachon gather in the tens of millions and make a spawning run up the bay's tributaries. The run draws an abundant array of species that come to the bay to feed on the eulachon. Hundreds of Steller sea lions, harbor seals, bald eagles, and sea gulls, among other wildlife, have been observed descending on the bay in search of food during the eulachon run.

6. Plaintiffs are organizations whose members use Lower Slate Lake and Berners Bay for recrea-

tion, fishing, camping, photography, wildlife viewing, and other activities. These organizations seek declaratory and injunctive relief preventing Defendants from allowing harm to the lake and the bay, and thereby to their members, pending compliance with the law.

JURISDICTION, RIGHT OF ACTION, AND VENUE

7. This court has jurisdiction pursuant to 28 U.S.C. § 1331 and may issue a declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201-02. Judicial review available under the Administrative Procedure Act. 5 U.S.C. §§ 701-06.

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e).

PLAINTIFFS

9. Southeast Alaska Conservation Council (SEACC) is a nonprofit organization of eighteen volunteer conservation groups in fourteen communities across the Southeast Alaska panhandle, from Yakutat to Ketchikan, and over 2000 individual members, the majority of whom live in Alaska. SEACC advocates the conservation and wise long-term management of the scenic, wilderness, fish, wildlife, recreation, subsistence and other natural resources and values of Southeast Alaska. SEACC's organizational members include Lynn Canal Conservation and the Juneau Group of the Sierra Club.

10. Sierra Club is a national grassroots conservation organization with about 767,000 members, including about 1,800 Alaska residents, who are inspired by nature. They explore, enjoy, and protect the wild places of the earth including the Berners Bay area of the Tongass National Forest. They prac-

tice and promote the responsible use of the earth's ecosystems and resources. For over a hundred years they have sought to educate and enlist humanity to protect and restore the quality of the natural and human environment. Sierra Club members reside in nearly every community of Southeast Alaska, from Yakutat to Ketchikan.

11. Lynn Canal Conservation, Inc. is a non-profit, volunteer grassroots conservation organization founded in 1971, based in Haines, Alaska. It has approximately 150 members, all of whom reside in Southeast Alaska. Lynn Canal Conservation works to protect the environment of the Lynn Canal area, including the Berners Bay area.

12. Plaintiffs participated actively in the administrative processes leading up to the various approvals for the Kensington Gold Project. Plaintiffs submitted comments on draft permits, proposed actions, and draft, final, and supplemental EISs for the project. Plaintiffs exhausted the administrative remedies for the decision challenged in this Complaint.

13. Members of plaintiff organizations reside near, visit, or otherwise use and enjoy areas that will be affected by the Kensington mine project, including Berners Bay and Lower Slate Lake. In particular, members of plaintiff organizations use these areas for swimming, fishing, hunting, wildlife viewing, photography and education, and aesthetic and spiritual enjoyment. Plaintiffs and their members derive recreational, aesthetic, and conservation benefits and enjoyment from these areas. The construction and operation of the proposed gold mine will directly and irreparably injure these interests.

DEFENDANTS

14. Defendant United States Army Corps of Engineers is an agency of the United States. It is charged, among other things, with issuing permits for the discharge of dredged or fill material under section 404 of the Clean Water Act. The Corps issued the section 404 permits challenged here.

15. Defendant Colonel Timothy J. Gallagher is the District Engineer for the Alaska District office of the United States Army Corps of Engineers in Anchorage, Alaska. The District office is responsible for issuing permits for the discharges of dredged or fill material in Alaska under section 404 of the Clean Water Act. Defendant Gallagher signed the Corps' Revised Record of Decision, the section 404 permits challenged here, and the letters reinstating those permits.

16. Defendant Larry L. Reeder is the Chief of the Regulatory Branch in the Alaska District office of the United States Army Corps of Engineers in Anchorage, Alaska. He is responsible for issuing permits for the discharge of dredged or fill material in Alaska under section 404 of the Clean Water Act, and he signed the section 404 permits challenged here.

17. Defendant Dominic Izzo is the Principal Deputy Assistant Secretary of the Army (Civil Works). On May 2, 2002, he signed the Corps' new regulations covering the definitions of "fill material" and "discharge of fill material" on which the Corps relied in issuing the Kensington permit challenged here.

18. The full name of Defendant United States Forest Service is United States Department of Agriculture, Forest Service. It is an agency of the Department of Agriculture entrusted with the ad-

ministration of the national forests, including the Tongass National Forest. It regulates mining claimants' use of national forest lands, and it approved the plan of operations for the Kensington gold mine, including the use of Lower Slate Lake for the disposal of mine tailings, within the Tongass National Forest.

FACTS

19. This project dates back to 1989 when Coeur Alaska first proposed the development of the Kensington mine. Coeur Alaska made that proposal as a joint venture with Echo Bay Exploration, Inc.

20. On June 1, 1991, the Forest Service released a draft environmental impact statement (DEIS) for the project. On January 29, 1992, the Forest Service released the final environmental impact statement (FEIS) and signed the Record of Decision (ROD).

21. At that time, Coeur Alaska claimed that the Kensington gold ore reserves included approximately 2,000,000 ounces of gold. Accordingly, the Forest Service's 1992 ROD authorized Coeur Alaska to mine approximately 200,000 ounces of gold per year for 10-12 years.

22. Under the 1992 plan, Coeur Alaska would have produced 26 million tons of mine tailings, 25% of which would have been backfilled. The rest of the mine tailings would have been disposed of in Sherman Creek, a creek that feeds into Lynn Canal.

23. Coeur Alaska intended to construct a dam in Sherman Creek in order to create a "waste disposal facility" for its mine tailings, which would have had the capacity to store 30 million tons of tailings.

24. Coeur Alaska, however, did not receive any permits from the Corps or the United States Envi-

ronmental Protection Agency (EPA). EPA believed the Corps should regulate the construction of the dam and, in so doing, consider the impacts of both the dam and the disposal of the mine tailings. The Corps believed that it lacked both the expertise and jurisdiction to regulate the discharge of mine tailings into a waterway. Neither the Corps nor EPA contemplated regulating the mine tailings as "fill material."

25. Corps Headquarters and EPA Headquarters met to resolve their disagreement. According to the resulting EPA guidance, the Corps would issue a section 404 permit for the construction of a dam in Sherman Creek. After the installation of the dam, the impounded waters would no longer be considered jurisdictional "waters of the United States" under the Clean Water Act and, as a result, neither agency would regulate the direct discharges of pollutants into the impounded waters. Instead, the Corps would consider the impacts from the disposal of the mine tailings in connection with its analysis in issuing the section 404 permit for the dam. EPA would regulate discharges from the impounded area into the creek below the dam pursuant to section 402 of the Clean Water Act.

26. Despite this guidance, neither the Corps nor EPA issued a permit for the project.

27. In 1995, Coeur Alaska bought out Echo Bay Exploration's interest in the Kensington Gold Project and became the sole operator.

28. In 1996, Coeur Alaska submitted a revised, amended plan of operations. In this version, Coeur Alaska made two significant changes. First, it would not use on-site cyanidation but would send the ore concentrate off-site for final processing. Second,

Coeur Alaska proposed to dispose its mine tailings by thickening them to approximately 55% solids and then discharging them in a wetland area between Sweeny and Sherman Creeks. The agencies referred to this proposal as a "dry tailings facility."

29. Under the 1996 Amended Plan of Operations, Coeur Alaska would provide on-site, temporary housing for its employees during the life of the mine.

30. On February 18, 1997, the Forest Service released a draft supplemental environmental impact statement (DSEIS). On August 1, 1997, the Forest Service issued a final supplemental environmental impact statement (FSEIS) and ROD for the 1996 Amended Plan of Operations.

31. On January 28, 1998, the Corps issued Coeur Alaska a permit pursuant to section 404 of the Clean Water Act for the construction of the dry tailings facility. On April 14, 1998, EPA issued Coeur Alaska a permit pursuant to section 402 to discharge runoff and leachate from the facility.

32. Despite having received its permit approvals, Coeur Alaska decided not to proceed with the project but, instead, reviewed other ways to cut project costs.

33. In November 2001, Coeur Alaska submitted another amended plan of operations to the Forest Service. Once again, Coeur Alaska substantially modified its proposal, Coeur Alaska proposed to mine a much smaller, higher-grade ore body than it would have done under its 1996 Amended Plan of Operations. It would produce about 100,000 ounces of gold per year for 10 years instead of about 200,000 ounces of gold per year for 10 years.

34. Coeur Alaska would produce 7.5 million tons of mine tailings, instead of 26 million tons. Coeur

Alaska proposed to backfill up to 40% of its tailings (3 million tons) and discharge the remaining 4.5 million tons into Lower Slate Lake, a freshwater alpine lake that feeds into Slate Creek.

35. Specifically, Coeur Alaska proposed to construct a 90-foot tall by 500-foot long dam below the lake to enlarge it and then discharge the tailings via a 3.5-mile pipeline from its milling facility directly into the lake.

36. Under the 2001 Amended Plan of Operations, Coeur Alaska will not provide on-site employee housing. Instead, it will transport its employees via ferry. To do this, Coeur Alaska will construct marine terminals at Cascade Point and Slate Creek Cove, and the shuttle vessel will make three to five round-trips per day during the week and three round-trips per day during weekends.

37. On January 23, 2004, the Forest Service released another DSEIS. On December 23, 2004, the Forest Service released a FSEIS and a third ROD. In the 2004 FSEIS, Alternative A, the no-action alternative, is the approved alternative from the 1997 FSEIS, i.e., using the "dry tailings facility" and providing on-site employee housing. Alternative A1 is similar to Alternative A except that it involves mining under the reduced rate of Coeur Alaska's current proposal and therefore results in fewer impacts. Alternative D, the alternative selected in the 2004 FSEIS, involves mining at the reduced rate, discharging the processed waste or tailings into Lower Slate Lake, and shuttling the mine workers back and forth every day between Cascade Point and Slate Creek Cove.

38. At the time the Forest Service released the 2004 DSEIS, EPA and the Corps were discussing

how they would regulate the disposal of the mine tailings. They considered following the procedure that they had outlined in 1992, i.e., redefining the lake as a "waste treatment facility" and not regulating the direct discharge of tailings into Lower Slate Lake. They also considered for the first time labeling the mine tailings "fill material" based on rule changes, promulgated by the Corps and EPA in 2002, that amended the definitions of "fill material" and "discharge of fill material." Under that approach, the Corps would regulate the direct discharge of mine tailings at the end of the pipe into the lake.

39. In May 2004, the agencies decided that the mine tailings should be deemed "fill material," and the Corps would regulate Coeur Alaska's discharge of the processed mine waste from the milling facility into Lower Slate Lake pursuant to section 404 of the Clean Water Act. EPA would regulate the discharges from Lower Slate Lake into waters below the lake pursuant to section 402 of the Act.

40. On June 17, 2005, the Corps signed the section 404 permit allowing Coeur Alaska to discharge its mine tailings into Lower Slate Lake.

41. On June 29, 2005, EPA issued a section 402 permit to Coeur Alaska for the discharges from Lower Slate Lake into the East Fork of Slate Creek Cove.

42. On July 15, 2005, the Corps issued a section 404 permit to Goldbelt, Inc., the owner of lands at Cascade Point, for the construction of a marine terminal facility there. The sole purpose of this facility is to provide a shuttle service for the Kensington mine.

43. Plaintiffs filed their initial Complaint on September 12, 2005. Shortly thereafter, the Corps decided to suspend both section 404 permits and re-evaluate its decision. On November 29, 2005, the Corps formally suspended the permits. On March 29, 2006, the Corps rendered a revised Record of Decision and reinstated the original permits. Coeur Alaska's section 404 permit for the disposal of mine tailings remained the same. The Corps slightly modified the section 404 permit for the Cascade Point marine facility to make clear that the permit is dependent on the proposed plan of operations for the Kensington mine.

44. Pursuant to its section 404 permit, Coeur Alaska proposes to discharge, on average, 210,000 gallons of mine tailings per day into Lower Slate Lake, totaling about 4.5 million tons over 10 years. The tailings discharge into the lake is projected to have a concentration of about 550,000 milligrams per liter of total suspended solids and pH between 10 and 11.

45. The tailings discharges will likely kill all fish and invertebrates in Lower Slate Lake.

46. Coeur Alaska and Defendants have not established that fish and other aquatic life will be able to re-populate Lower Slate Lake after Coeur Alaska stops discharging its mine waste into the lake. Coeur Alaska conducted two freshwater sediment toxicity tests on freshwater benthic invertebrates using samples of tailings generated from Kensington ore. One of those tests revealed a statistically significant drop in survival rate for the test organism. In other words, the tailings killed the organism.

47. Coeur Alaska failed to preserve any more samples of tailings to conduct further habitability tests on freshwater organisms.

COUNT I

(Clean Water Act)

48. Plaintiffs repeat and incorporate by reference the allegations of the preceding paragraphs.

49. The purpose of the Clean Water Act is "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

50. To further these goals, section 301(a) of the Clean Water Act prohibits "the discharge of any pollutant by any person" unless done in compliance with the Act, such as pursuant to a permit issued under section 402 or 404. 33 U.S.C. § 1311(a).

51. Section 402 of the Act established the National Pollutant Elimination Discharge System (NPDES) permit program. 33 U.S.C. § 1342. These permits contain specific terms and conditions, as well as numerical discharge limits, which govern the activities of pollutant dischargers.

52. Congress directed EPA to promulgate effluent limitations for point source discharges of pollutants. 33 U.S.C. § 1311(b). Congress also directed EPA to identify categories of point sources and promulgate national standards of performance for new sources within each category. 33 U.S.C. § 1316(b)(1).

53. An effluent limitation "means any restriction established by a State or [EPA] on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, . . . including

schedules of compliance." 33 U.S.C. § 1362(11). A standard of performance is "a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which [EPA] determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants." 33 U.S.C. § 1316(a)(1). Since standards of performance reduce or eliminate quantities, rates, or concentrations of pollutants, they constitute effluent limitations.

54. Section 404 of the Clean Water Act authorizes the Corps to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a).

55. Between 1977 and 2002, EPA and the Corps had different definitions for "fill material" and similar definitions for "discharge of fill material." In 2002, the agencies promulgated new regulations amending those definitions and making them identical. Under the new regulations, "fill material means material placed in waters of the United States where the material has the effect of: (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e)(1).

56. In enacting this regulation, however, the Corps made clear that it was not changing existing regulatory practice. Under the agencies' longstanding practice, point source discharges for which EPA had promulgated effluent limitations are not "fill material." Instead, those discharges are subject to regulation under section 402 and must comply

with EPA's effluent limitations at the end of the pipe.

57. On December 3, 1982, EPA promulgated national standards of performance for new gold mines with mills that use a froth-flotation process to separate the gold minerals from the rock. 47 Fed. Reg. 54,598 (Dec. 3, 1982).

58. The standard of performance for mines proposed after 1982 prohibits the discharge of process wastewater to navigable waters except where net precipitation exceeds net evaporation, in which case the difference between the two can be discharged, and where there is a buildup of contaminants that significantly interferes with the ore recovery process, in which case a discharge can occur to correct the interference problem. 40 C.F.R. § 440.104(b).

59. The milling process for the Kensington gold mine will use a froth-flotation process for the beneficiation of gold.

60. Coeur Alaska constitutes a "person" under the Act. 33 U.S.C. § 1362(5).

61. The mine tailings generated by the milling process in this project constitute a "pollutant" under the Act, which includes industrial waste. 33 U.S.C. § 1362(6).

62. The 3.5-mile pipeline leading from the milling facility to Lower Slate Lake is a discernible, confined and discrete conveyance and therefore a "point source" under the Act. 33 U.S.C. § 1362(14).

63. Lower Slate Lake constitutes "navigable waters" under the Act. 33 U.S.C. § 1362(7).

64. Coeur Alaska's proposed daily discharges of 210,000 gallons of mine tailings thus constitutes a

point source discharge of pollutants. Those discharges are subject to the national standard of performance that EPA promulgated in 1982 for discharges from froth-flotation gold mills at the end of the pipe into Lower Slate Lake. 40 C.F.R. § 440.104.

65. Congress directed that the effluent limitations established by EPA "shall be applied to all point sources of discharge of pollutants in accordance with the provisions of the Act. 33 U.S.C. § 1311(e).

66. Congress also provided that "it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source." 33 U.S.C. § 1316(e).

67. Although EPA has promulgated a national standard of performance for the proposed discharge from Coeur Alaska's milling facility, neither EPA nor the Corps is going to apply that standard to the discharge of pollutants at the end of the pipe.

68. Instead, the Corps has authorized the direct point source discharge of processed mine waste into Lower Slate Lake pursuant to section 404 of the Act on the ground that such waste is "fill material."

69. When the Corps and EPA implemented their new regulations defining "fill material" and the "discharge of fill material," 33 C.F.R. § 323.2, they stated that pollutants for which EPA has promulgated effluent limitations do not constitute "fill material" even if their discharge has the effect of fill.

70. Therefore, the Corps' attempt to regulate the point source discharge of pollutants for which EPA has promulgated effluent limitations circumvents the purpose of the Clean Water Act, violates the requirements of sections 301(e) and 306(e), 33 U.S.C.

§§ 1311(e) & 1316(e), violates the Corps' and EPA's respective regulations, and is inconsistent the Corps' and EPA's long-standing regulatory practice.

71. The Corps' decision to issue a section 404 permit for the discharges of processed mine waste from the milling facility directly into Lower Slate Lake is therefore arbitrary, capricious, and not in accordance with law.

72. To the extent that the regulations defining "fill material" and the "discharge of fill material," 33 C.F.R. § 323.2, are interpreted to authorize the proposed discharges of processed mine waste from the milling facility directly into Lower Slate Lake, the regulations and the section 404 permit issued under them are inconsistent with the Clean Water Act and therefore arbitrary, capricious, and not in accordance with law.

73. The Forest Service is directed to manage the various resources of the national forests, including watersheds and fish, for multiple use in a manner that best meets the needs of the American people and will not impair the productivity of the land. 16 U.S.C. §§ 528-31, 551, 1600-14.

74. The plan of operations the Forest Service approved for the Kensington mine includes the discharge of processed mine waste directly into Lower Slate Lake, contrary to the Clean Water Act. The Forest Service's approval is therefore arbitrary, capricious, and not in accordance with law.

75. The Corps' section 404 permit for the construction of a marine terminal facility at Cascade Point is intended solely to facilitate the operations at Kensington mine and is dependent on the proposed plan of operations. The Corps' decision to reinstate this

permit, as modified, is therefore arbitrary, capricious, and not in accordance with the law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

1. Enter a declaratory judgment that the Corps' section 404 permit for the discharge of processed mine waste for which. EPA has promulgated effluent limitations is inconsistent with the Clean Water Act and unlawful;

2. Enter a declaratory judgment that the plan of operations approved by the Forest Service is inconsistent with the Clean Water Act and unlawful;

3. Enter a declaratory judgment that the Corps' section 404 permit for the construction of a marine terminal facility at Cascade Point is inconsistent with the Clean Water Act and unlawful;

4. Set aside the section 404 permit the Corps issued to Coeur Alaska for the discharge of mine tailings into Lower Slate Lake, the Forest Service's plan of operations, and the section 404 permit the Corps issued to Goldbelt, Inc. for the construction of a marine terminal facility at Cascade Point;

5. Enter appropriate injunctive relief;

6. Award plaintiffs the costs of this action, including reasonable attorneys' fees; and

7. Grant such other relief as this Court deems just and proper.

Respectfully submitted this 4th day of April 2006,

/s/ Demian A. Schane

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APPENDIX U

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

SOUTHEAST ALASKA CONSERVATION COUNCIL; SIERRA CLUB; and LYNN CANAL CONSERVATION,

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; COLONEL TIMOTHY J. GALLAGHER, in his official capacity as District Engineer; LARRY L. REEDER, in his official capacity as Chief of the Regulatory Branch; JOHN C. LEEDS, III, in his capacity as manager of the Juneau Field Office; GLEN E. JUSTIS, in his capacity as Chief of the East Section; DOMINIC IZZO, in his official capacity as Prin-

No. 1:05-cv-00012-JKS

MEMORANDUM DECISION

[Re: Motions at Dockets 41 and 80]

cipal Deputy Assistant Secretary of the Army (Civil Works); and UNITED STATES FOREST SERVICE,

Defendants,

and

COEUR ALASKA, INC.; STATE OF ALASKA; and GOLDBELT, INC.,

Defendant-Interveners.

I. PROCEEDINGS

Plaintiffs Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation appeal the decision of the U.S. Army Corps of Engineers ("Corps") decision to grant permits to Coeur Alaska, Inc. and Goldbelt, Inc, under § 404 of the Clean Water Act ("CWA").[1] Plaintiffs seek to vacate the § 404 permits, Record of Decision and plan of operations, and permanently enjoin the Corps and Forest Service from allowing any activities authorized by the vacated permits, ROD, and plan of operations. At Docket No. 41 Plaintiffs have moved for summary judgment. At Docket No. 80 the Federal Defendants have opposed the motion and cross-

[1] 33 U.S.C. § 1344.

moved for summary judgment in their favor.[2] At Docket Nos. 61, 67, and 71, respectively, Interveners Goldbelt, Inc., State of Alaska, and Coeur Alaska, Inc. have filed oppositions to Plaintiffs' motion. City and Borough of Juneau and Berners Bay Consortium have filed amici briefs in opposition to Plaintiffs' Motion at Docket Nos. 88 and 92, respectively. At Docket No. 97 Southeast Conference has filed an amicus brief in support of the Plaintiffs' motion. Plaintiffs have replied to the opposition.

At Docket Nos. 83 and 86 Intervener Coeur Alaska and the Federal Defendants have requested oral argument. The Court having reviewed the moving papers, oppositions, and amici briefs has determined that oral argument would not assist the court in deciding the motions. The requests for oral argument are DENIED.

II. BACKGROUND[3]

The permit granted Coeur Alaska allows it, as the operator of the Kensington Mine, to discharge approximately 210,000 gallons per day of tailings remaining after gold ore is processed using the "froth-flotation process" as "fill material" directly into Lower Slate Lake. The lake will be utilized as a storage facility impounding the tailings.[4]

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[2] For convenience, the named defendants are referred to collectively as "Federal Defendants."

[3] The background and history of this case are well known to the parties and, in the interests of brevity, will not be replicated here except as necessary to an understanding of the Court's decision.

[4] Agency Record ("AR"), Vol. 8, 003328.

After the ore is extracted from the ground, it will be processed through crushing, grinding, flotation, thickening and filtration.[5] After the ore is crushed and ground, it is fed to the flotation tanks in slurry form, where air, conditioners and frothing agents will be added to cause the gold-bearing minerals to attach to air bubbles at the top of the tank.[6] The gold-bearing froth is then skimmed off and further concentrated in additional flotation tanks.[7] Most of the chemicals added to the system will stay in the flotation tanks or be removed with the flotation concentrate, not discharged with the tailings. [8] Similarly, most of the other metals will be removed from the system along with the gold concentrate, not discharged with the tailings.[9] Following the final flotation, the ore concentrate is dewatered and placed in specialized, sealed marine transport containers for shipment to a facility outside Southeast Alaska for further processing.[10] No cyanide processing will take place at the Kensington Mine or elsewhere in Southeast Alaska.[11]

"Tailings" are the solid material left in the bottom of the flotation tanks after the gold-bearing

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5 AR Vol. 8, 003360–61; *see also* Vol. 1, 000021.

6 AR Vol. 8, 003360–61.

7 *Id.*

8 *Id.*

9 *Id.*; *see also* AR Vol. 1, 000005.

10 AR Vol. 1, 000005; Vol. 8, 003360–61.

11 AR Vol. 1, 000005, 000021.

material has been removed.[12] Using "high-grade" mine operations, approximately 40% of the tailings should be backfilled to the mine, leaving approximately 4.5 million tons of tailings to be discharged into the Lower Slate Lake impoundment.[13] The tailings will be combined with liquid in a slurry and transported through a 3.5 mile, double-walled, high-density polyethylene pipeline approximately 6 inches in diameter to the lake impoundment.[14] The solid component of the slurry (*i.e.*, the tailings) will comprise approximately 55% of the slurry. Before the tailings slurry leave the mill, a polymer and flocculant will be added to agglomerate the smaller tailings and enhance settling of the tailings once they are deposited into the lake impoundment.[15] The tailings slurry is to be discharged from the bottom of the submerged pipe and through perforations in that pipe, which will be moved periodically to ensure equal distribution of the tailings.[16] The tailings will be placed at a depth that would prevent remobilization of the tailings.[17] Upon closure of the mine, the tailings will fill the lake to its current ordinary high water mark, thus reaching a depth of approximately

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12 AR Vol. 8, 003362.

13 AR Vol. 1, 000007; Vol. 8, 003358, 003362, 003367.

14 AR Vol. 8, 003364.

15 *Id.* The added materials are not toxic and are expected to have no effect on water quality other than the benefit of enhancing the settling of the fine material.

16 *Id.*

17 AR Vol. 1, 000022.

50 feet.[18] At that time, the lake will have grown to approximately 62 acres from its current size of 23 acres, and will be approximately 33 feet deep over the top of the tailings.[19] The discharge of tailings to the lake impoundment is limited to the pre-specified volume of 4.5 million tons.[20] The tailings must also be tested quarterly to ensure that there are no significant deviations from the original tailings analysis that might affect monitoring, closure requirements, water quality or any other permit condition.[21]

It is anticipated that most aquatic life in Lower Slate Lake will be lost during mining operations, primarily due to being covered with the discharged material.[22] Tests on the tailings show that they will not generate an acid discharge or metals leachate.[23] While the pH around the discharge pipe is expected to be toxic to the aquatic environment, it is anticipated this will dissipate very rapidly.[24] Reclamation of the 62-acre lake, including capping of the tailings,

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18 AR Vol. 1, 000013; Vol. 8, 003453.

19 AR Vol. 1, 000013. The increased lake area at closure is expected to consist of approximately 47 acres of deep-water habitat and 15 acres of shallow-water habitat. The 15 acres of shallow-water habitat is expected to convert over time to wetlands or vegetated shallows.

20 *See* AR Vol. 1, 000068; Vol. 13, 006285.

21 AR Vol. 1, 000022, 000067–68.

22 AR Vol. 1, 000021–22; Vol. 8, 003575.

23 AR Vol. 1, 000030.

24 AR Vol. 1, 000022.

is required as part of the project.[25] As a result, it is expected that the lake would recover over time, and would provide at least equivalent aquatic habitat and productivity as it does currently.[26] This includes habitat for Dolly Varden char and other aquatic organisms.[27]

Mid-Lake East Fork Slate Creek, an upstream tributary of Lower Slate Lake, will be diverted around the lake impoundment by a pipeline.[28] Further, a "reverse osmosis" water treatment system will be constructed to remove solids and metals from the lake impoundment water before any of that water is allowed to enter downstream waters.[29] The treated water will be transported from the treatment plant to the diversion pipeline, and then flow via a spillway to East Fork Slate Creek, downstream of the lake, eventually joining Slate Creek and entering Berners Bay.[30] Discharges of the treated water from Lower Slate Lake are subject to a CWA § 402

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[25] AR Vol. 1, 000013, 000015, 000022–23. A reclamation bond on the operation is being held to ensure that the lake is reclaimed in accordance with the approved plans. *See* AR Vol. 1, 000005.

[26] AR Vol. 1, 000022–23; Vol. 8, 003573–76.

[27] AR Vol. 1, 000022–23, 000069; Vol. 8, 003573–76.

[28] AR Vol. 8, 003367.

[29] AR Vol. 1, 000015; Vol. 8, 003367.

[30] *Id.*

NPDES permit and must meet state water quality standards.[31]

The overall impact of the project permitted by the Corps and EPA is to convert Lower Slate Lake into a temporary settling pond for the disposal and treatment of the tailings generated by the mining operations at the Kensington Mine. Broadly stated, the project entails; (1) isolating Lower Slate Lake from the rest of the drainage system, (2) using the lake as a tailing storage facility impounding the tailings, and (3) restricting the release of water into the downstream drainage system to that which meets the requirements of § 402. The adverse impact, primarily the destruction of aquatic life, is expected to be limited to Lower Slate Lake. At the termination of the mining operations, restoration of the lake as an aquatic resource is expected to occur.

III. ISSUES

Plaintiffs contend that the permitting process involved in this case was governed by the more stringent requirements of § 402 of the CWA,[32] not § 404. At the heart of the controversy are the regulations defining "fill material." The Environmental

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[31] AR Vol. 1, 000005. The State agreed in its CWA § 401 certification that the water discharged from the tailings disposal facility (Lower Slate Lake) to East Fork Slate Creek, which was permitted under a CWA § 402 NPDES permit, would meet state water quality standards. AR Vol. 2, 001101. Plaintiffs do not challenge the issuance of this permit.

[32] 33 U.S.C. § 1342.

Protection Agency ("EPA") and the Corps use the same definition.[33]

> (e) (1) Except as specified in paragraph (e)(3) of this section, the term fill material means material placed in waters of the United States where the material has the effect of:
>
> (i) Replacing any portion of a water of the United States with dry land; or
>
> (ii) Changing the bottom elevation of any portion of a water of the United States.
>
> (2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.
>
> (3) The term fill material does not include trash or garbage.

Also relevant is the definition of "discharge of fill material," defined as:[34]

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[33] 33 C.F.R. § 323.2(e) (Corps); 40 C.F.R. § 232.2 (EPA). [Note: The quoted provision is the Corps' regulation; the definition in the EPA regulations is identical except that the definitions are not set forth in separate subdivisions.]

[34] 33 C.F.R. § 323.2(f) (Corps); 40 C.F.R. § 232.2 (EPA) (emphasis added).

(f) The term *discharge of fill material* means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; *placement of overburden, slurry, or tailings or similar mining-related materials*; and artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products (See §323.4 for the definition of these terms). See §323.3(c) concerning the regulation of the placement of pilings in waters of the United States.

Plaintiffs contends that either: (1) in issuing the permit, the Corps misapplied the regulations; or (2) if the regulations were properly applied, the regulations are invalid as contrary to the CWA.[35] The real crux of the question before this Court is: Under § 404, may the Corps authorize the use of waters of the United States as a settling pond? For the reasons stated below, the Court holds that it may.

IV. STANDARD OF REVIEW

This Court in reviewing an agency decision may set it aside if the agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[36] It is self-evident that an agency decision based upon an invalid regulation or the misapplication of a regulation is "otherwise not in accordance with law."[37]

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[35] The Court notes that Plaintiffs also challenges the granting of the permit on the grounds that it does not meet the requirements of the several sections of the CWA, *e.g.*, §§ 306(e) and 311(e). This argument must be rejected. If the permit was properly issued under § 404, those provisions of the CWA are inapplicable. The applicable standard to be applied are the guidelines promulgated by the EPA based on criteria specified in 33 U.S.C. § 1343(c). *See also* 33 C.F.R. 323.6(a). If the permit was not properly issued under § 404 it is invalid in any event and the argument of Plaintiffs moot.

[36] 5 U.S.C. § 706(2)(A).

[37] *See, e.g., Regents of the Univ. of California v. Heckler*, 771 F.2d 1182, 1187 (9th Cir. 1985) (invalid regulation), *overruled on other grounds by Good Samaritan Hosp. v. Shalala*, 508 U.S. 402 (1993); *Alaskan Trojan P'ship v.*

[Footnote continued on next page]

In determining the validity of agency regulations, this Court must apply the rule established by the U.S. Supreme Court in *Chevron*.[38]

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.* * * * [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

The Supreme Court has, however, placed a limitation on the application of *Chevron*.[39]

> Deference in accordance with *Chevron*, however, is warranted only when it appears that Congress delegated au-

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Gutierrez, 425 F.3d 620, 627–628 (9th Cir. 2005) (agency interpretation of its own regulations)

[38] *Chevron v. NRDC*, 467 U.S. 837, 842–843 (1984) (footnote omitted)

[39] *Gonzales v. Oregon*, 546 U.S. ___, ___, 126 S. Ct. 904, 914–915 (2006) (citations and internal quotation marks omitted).

> thority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Otherwise, the interpretation is entitled to respect only to the extent it has the power to persuade.

When reviewing the interpretation of agency regulations, courts must give substantial deference to an agency's interpretation of its own regulations. [40] This Court "must defer to the [Administrator's] interpretation unless an alternative reading is compelled by the regulation's plain language or by other indications of the [Administrator's] intent at the time of the regulation's promulgation."[41]

IV. DISCUSSION

The CWA divides the permitting process into two segments. In general, permitting for the discharge of

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[40] *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (citations omitted).

[41] *Id.* (internal quotation marks and citation omitted); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997) (an agency's interpretation of its own regulations is "controlling unless plainly erroneous or inconsistent with the regulation") (citations and internal quotation marks omitted); *Wards Cove Packing Co. v. NMFS*, 307 F.3d 1214, 1218 (9th Cir. 2002) ("An agency's interpretation of regulations it is charged with administering is entitled to a high degree of deference and will be upheld as long as it is not plainly erroneous or inconsistent with the regulation.") (citations omitted).

effluents is vested in the EPA, the granting of which must meet strict standards.[42] Congress has, however, carved out an exception, vesting primary permitting authority in the Corps for the disposal of "dredged or fill material" into navigable waters at specified disposal sites.[43] The standards to be applied for the issuance of these permits is determined in accordance with guidelines developed by the EPA in conjunction with the Corps, and are significantly less stringent.[44]

Turning first to the issue of the validity of the regulation. Congress has clearly and unequivocally delegated authority to the EPA to issue regulations necessary to carry out its functions under the CWA.[45] As noted above, one of the functions of the EPA is to develop guidelines, in conjunction with the Corps, for use in guiding the Corps in processing permits under § 404.[46] In the case at bar, it is undisputed that Congress has not defined the term "fill material," thereby leaving its definition to the EPA, which the EPA did using the rule-making process of the Administrative Procedures Act. Accordingly, this

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42 33 U.S.C. § 1342(a).

43 33 U.S.C. § 1344(a).

44 33 U.S.C. §§ 1344(b)(1), 1343(c). The guidelines are promulgated in 33 C.F.R. Part 230. Plaintiffs do not contends that the permit issued to Coeur Alaska does not meet these guidelines.

45 33 U.S.C. § 1361(a) ("the Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter.").

46 33 U.S.C. § 1344(b)(1).

Court must give Chevron-type deference to the EPA's definition of "fill material" and "discharge of fill material."[47]

Plaintiffs argue that the regulations are invalid because they do not comply with the "expressed intent of Congress." Specifically, that because they do not comply with standards promulgated by the EPA, they are contrary to § 306(e) of the CWA.[48] Plaintiffs' argument on this point is not persuasive. Plaintiffs do not specify which standard of performance is violated by these regulations, which simply define what constitutes fill material within the scope of § 404. This Court cannot say that the definition of fill material contained in the regulations promulgated by the EPA and Corps is not a permissible construction of the statute. the Agency could reasonably conclude that its definition is consistent with the distinction Congress sought to make between § 402 and § 404.

Turning to the interpretation of the regulation and its application in this case. First, the Court notes that it is uncontested that the slurry to be discharged into Lower Slate Lake will "change the bottom elevation" of the lake. Thus, it at least facially falls within the definition of "fill material" contained in the regulations. Plaintiffs do not dispute

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[47] *See Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 316 F.3d 916, 921 (9th Cir. 2003).

[48] 33 U.S.C. § 1316(c) ("After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.").

this. Plaintiffs argue that the inclusion of mine tailings within the definition of "fill material" is contrary to the agencies' intent at the time the regulations were promulgated. Plaintiffs' argument is essentially predicated upon the point that at the time the regulations were amended in 2002, the statement accompanying the notice of adoption of the final rule made clear that there was no intent to include mine tailings as "fill material" or "discharge of fill material."[49] The provisions cited by Plaintiffs taken alone and in isolation would support a finding of a clear indication by the EPA and Corps that the interpretation advanced by Plaintiffs is correct. However, Plaintiffs overlook or ignore other statements included in the adoption statement that contradict Plaintiffs' position. Specifically:

> Today's final rule also includes several clarifying changes to the term "discharge of fill material." Specifically, the term "infrastructure" has been added in several places following the term "structure" to further define the situations where the placement of fill material is considered a "discharge of fill material." In addition, the phrases "placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills" and "*placement of overburden, slurry, or tailings or similar mining-related materials*" have been

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[49] Quoting various excerpts from 67 Fed. Reg. 31,129 – 31,143 (May 9, 2002).

> added to the definition of "discharge of fill material" *to provide further clarification of the types of activities regulated under section 404.*[50]

and,

> *The language in today's final rule will clarify that any mining-related material that has the effect of fill when discharged will be regulated as "fill material."* We made this clarification because it was clear from the comments that some were reading the examples we identified as an exclusive list. The general intent of this rule is to cover materials that have the effect of fill, not simply to focus on any one industrial activity. We believe that the additional mining related examples will address the confusion reflected in the comments. Finally, as discussed in section II.B.1.c of this preamble, we do not agree that the CWA contains a blanket prohibition precluding discharges of "waste" materials in to waters of the U.S. Instead, the Act establishes the framework for regulating discharges into waters and we believe the section 404 program is the most appropriate vehicle for regulating overburden and other mining-related materials.[51]

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50 *Id.*, 31,130 (emphasis added).

51 *Id.*, 31,135 (emphasis added).

Contrary to the arguments of Plaintiffs, the interpretation of the regulations in this case is not contrary to the intent of the EPA Administrator at the time she adopted the regulations in question. While Plaintiffs may offer another plausible interpretation of the regulations in question, that interpretation is not the only reasonable interpretation of the regulation and does not compel this court to strike down the Corps' different interpretation.[52] Congress has deemed it appropriate to delegate to the Administrator of Environmental Protection Agency and the Secretary of the Army to coordinate their respective jurisdictions under the Clean Water Act. This they have done by duly adopted regulations to which this Court must defer. The Corps properly issued the permit to Coeur Alaska, Inc. under § 404 of the Clean Water Act.

Plaintiffs also seek to set aside the permit issued to Goldbelt, Inc. to construct a marine terminal facility. As a basis for this action, Plaintiffs rely on the assumption that Coeur Alaska's § 404 permit will be revoked and, therefore, the need for the marine terminal facility becomes moot. As the Court has held that the permit to Coeur Alaska was properly issued, there is no basis for granting the relief requested as to Goldbelt, Inc. The same rationale applies to the ROD issued by the Forest Service.

VI. CONCLUSION/ORDER

Based upon the foregoing, Plaintiffs' Motion for Summary Judgment at Docket No. 41 is **DENIED**;

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52 *Akootchook v. United States*, 271 F.3d 1160, 1167 (9th Cir. 2001).

and the Cross-Motion for Summary Judgment filed by the Federal Defendants at Docket No. 80 is **GRANTED**.

IT IS HEREBY ORDERED THAT the complaint be, and it hereby is, **DISMISSED**, with prejudice.

The Clerk of the Court to enter judgment accordingly.

Dated at Anchorage, Alaska, this 3rd day of August 2006.

s/ James K. Singleton, Jr.
JAMES K. SINGLETON, JR.
United States District Judge

APPENDIX V

DECLARATION OF RANDY WANAMAKER

RANDY WANAMAKER declares under penalty of perjury as follows:

1. My name is Randy Wanamaker. I reside at 3814 Killewich Drive, Juneau, Alaska, 99801. I am making this declaration based on my personal knowledge of all the facts recited below and in opposition to Appellants' Emergency Motion Under Circuit Rule 27-3 for an injunction pending appeal of the decision of the United States District Court for the District of Alaska dismissing their complaint in *Southeast Alaska Conservation Council, et al. v. United States Army Corps of Engineers*. This Declaration supplements my attached Declaration of May 3, 2006 (Attachment 1), which was submitted to the District Court as an attachment to the Amicus Curiae brief of the Southeast Conference.

2. I am a Tlingit Indian. I am a shareholder in Intervenor/Appellee Goldbelt, Inc. ("Goldbelt"), the Native Urban Corporation formed pursuant to the Alaska Native Claims Settlement Act ("ANCSA") to receive and administer lands and other benefits on behalf of the Tlingit Indians residing in or having historical ties to the Juneau area, including Berners Bay where the Kensington Mine is located. Because of the critical importance of the Kensington Gold Project to the economic future of Goldbelt and its shareholders, as discussed in greater detail below,

Goldbelt has joined with the federal defendants, Coeur Alaska, Inc. ("Coeur"), and the State of Alaska ("Alaska") as intervenors in opposition to plaintiffs' efforts to kill the Kensington Gold Project.

3. I have been active in the affairs of Goldbelt in general, and specifically in their efforts to develop Goldbelt's lands in the Echo Cove/Cascade Point area, since 1993. From 1993 to 2001, and from 2003 to present I have served as a director of Goldbelt. From 2001 to 2003 I served as Chairman of the Board of Directors of Goldbelt.

4. I am a Certified Professional Geologist and Registered Environmental Assessor. From 1980 to 1990 I served as the Subsurface Resource Manager for Sealaska Corporation supporting and advising Goldbelt in regards to geologic and environmental issues.

5. I have carefully reviewed the attached Declaration of Joe Kahklen dated October 12, 2005 (Attachment 2), and submitted to the District Court in support of Goldbelt's motions for leave to participate in the litigation as an intervenor/defendant and in opposition to plaintiffs' motion for summary judgment. The statements made Chairman Kahklen are true to my own personal knowledge.

6. Since 2001 I have served as an elected member of the Assembly of the City and Borough of Juneau ("CBJ") Assembly. I currently serve as Deputy Mayor of CBJ and am personally acquainted with the overall status of economic activity in the City and Borough. Because CBJ has permitted the Kensington Gold Project, as well as Goldbelt's marine terminal at Cascade Point, and because of the critical importance of the Kensington Gold Project to the economy of Juneau and the surrounding areas,

CBJ has participated in the litigation as an amicus curiae urging the court to permit the Kensington Gold Project to go forward.

7. Both Goldbelt and CBJ are members of the Southeast Conference, a non-profit organization working to meet the transportation, energy, social welfare and economic needs of Southeast Alaska. I serve as a director of the Southeast Conference, and in that capacity I am generally familiar with depressed economic conditions throughout Southeast Alaska. Because the Kensington Gold Project is critically important to the future of Southeast Alaska, the Southeast Conference submitted an amicus curiae brief urging the court to reject the plaintiffs' challenge to the Kensington Gold Project.

8. From 1996 to 2003 I served as the coordinator of the Berners Bay Consortium ("BBC"), composed of the Native Urban/Village Corporations of Goldbelt, Kake and Klukwan, and liaison for BBC with Coeur. BBC was formed in 1996 to provide mine support services, and entered into a Memorandum of Understanding with Coeur dated January 29, 1996, discussed in greater detail below. From 2005 to the present, I have served as the Executive Director of the BBC Human Resource Development Corporation (BBCHRDC), where I am responsible for identifying, recruiting and training Alaska Natives and Alaska residents for employment at the Kensington Mine. The BBCHRDC is a joint venture owned in equal parts by Kake Tribal Corporation, Klukwan, Incorporated, Goldbelt, Incorporated and Coeur Alaska, Incorporated.

9. Because of the critical importance of the Kensington Gold Project to the Native Communities of Juneau, Kake and Klukwan (Haines), BBC also filed

an amicus curiae brief urging the Court to reject plaintiffs' claims. I have carefully considered the attached Declaration of Duff W. Mitchell (Attachment 3), and concur, based on my own personal knowledge, with his statements concerning the importance of the Kensington Gold Project to the Native communities of northern Southeast Alaska.

ISSUANCE OF AN INJUNCTION PENDING APPEAL WOULD HAVE A DEVASTATING IMPACT ON GOLDBELT

10. The site of the Kensington Mine, on Berners Bay some 40 miles north of Juneau, lies in the heart of Tlingit Indian aboriginal territory. Like my ancestors before them, many Juneau Tlingit continue to fish and hunt for subsistence purposes in the Berners Bay area.

11. Although Goldbelt is headquartered in the Juneau area, virtually all of the valuable land on the Juneau road system had already been granted to others by the time ANCSA was enacted in 1971. Consequently, Goldbelt was forced to select its land entitlement in relatively remote areas.

12. Goldbelt acquired its lands at Cascade Point on Berners Bay in 1983 as part of a Congressionally approved land exchange with the United States - after environmental groups, including Appellant Sierra Club and other plaintiffs in this litigation, sued to stop Goldbelt from exercising its rights under ANCSA to select valuable timber lands on Admiralty Island. Although the exchange was intended to appease the Sierra Club and the environmental community, and to provide Goldbelt with the quiet enjoyment of substitute lands that were then regarded as less environmentally sensitive, the

plaintiffs have continued to oppose and frustrate every effort by Goldbelt to develop these lands.

13. Over the years, Goldbelt has struggled to maintain profitability. Goldbelt's future economic well being hinges, in significant part, on its ability to develop its land at Echo Cove and Cascade Point. These lands are currently zoned by CBJ as "new growth area." Goldbelt has developed a Master Plan for this area with a focus on service to the mining, tourism and fishing industries.

14. In 1998 Appellant SEACC and others succeeded in defeating Goldbelt's application to build a dock at Cascade Point by arguing, in part, that there was no economic need for the dock at that time. SEACC also opposed Goldbelt's application for road access to the Cascade Point area for administrative purposes.

15. When Coeur revised its Plan of Operations to shift mine access to Slate Creek Cove on Berners Bay, Goldbelt renewed its applications to construct a marine terminal at Cascade Point to serve, among other purposes, as a shuttle point for mineworkers residing in Juneau. CBJ and United States Army Corps of Engineers issued permits to construct the facility, but limited its use to mine worker ferry operations.

16. Goldbelt has entered into a long-term agreement with Coeur to lease the Cascade Point marine terminal and other properties and to provide mine worker shuttle services to and from Cascade Point (including land transportation from designated parking areas in Juneau to the Cascade Point terminal). The terms of this agreement will enable Goldbelt to amortize the cost of acquiring transportation equipment and constructing the marine

terminal, and in addition to generate employment and significant profits for Goldbelt's shareholders.

17. To date, Goldbelt has invested roughly three-quarters of million dollars in its efforts to permit and construct a dock at Cascade Point. Engineering for the marine terminal (at a cost of nearly $200,000) is virtually complete, and contracts for dock and breakwater construction will be finalized in coming weeks. After years of frustration, Goldbelt is finally prepared to construct the terminal. Goldbelt can complete the dock this construction season and begin ferrying workers to the mine site by the end of the year.

18. Construction of the Cascade Point terminal is linked to continuing construction and operation of the Kensington Mine. If the Kensington project tailings facility construction is enjoined pending resolution of an appeal, the current construction season on the marine terminal also will be will be lost or abbreviated. Completion and commencement of operation of the terminal will be delayed for at least an equivalent period of time. An injunction pending appeal, would cost Goldbelt anticipated profits of $525,000 annually from operation of the terminal and provision of miner transportation services. Twelve-to-fifteen shareholder jobs would be lost. An injunction would also jeopardize the hundreds of thousands of dollars Goldbelt already has invested in permitting and developing its Berners Bay properties, and cause irreparable harm to Goldbelt's long standing efforts to make economic use of those lands.

19. In addition to the economic benefits tied to construction and operation of the marine terminal, Goldbelt and its shareholders anticipate that they will share in other economic opportunities and bene-

fits created by the Kensington Mine as described more specifically below, all of which will be lost or deferred indefinitely if the Court enters the injunction requested by the Appellants.

ISSUANCE OF AN INJUNCTION PENDING APPEAL WOULD HAVE A DEVASTATING IMPACT ON THE NATIVE COMMUNITIES OF SOUTHEAST ALASKA

20. My own observations, confirmed by a recent University of Alaska study, are that unemployment and underemployment are two-to-three times higher among Natives than the non-Native population.[1] Per capita income of Alaska Natives is about half that of non-Natives.[2] Based on my own experience, I believe that these statistics probably understate conditions in Southeast Alaska, especially in rural areas like Kake, hard hit by recent declines in timber and fishing related jobs. Many of the jobs that are available to area Natives are seasonal, low paying, and do not provide benefits.

21. Through its Memorandum of Understanding with BBC, Coeur and its contractors are committed to and are achieving meaningful hiring goals for Native employees. For a number of years, for example,

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[1] G. McDiarmid, et al., "Expanding Job Opportunities for Alaska Natives" (Institute of Social and Economic Research 1998), available on line at www.iser.usa.alaska.edu/publictions/client/afnjobs/afnjobs.htm.

[2] According to the Alaska Federation of Natives in an on line publication at www.nativefederation.org/ance/purpose.php.

Coeur has been assisting in efforts to train Alaska Natives and Alaska residents for full time, high paying jobs in the mining industry. Currently the BBCHRDC - which receives approximately 60% of its funds from Coeur - operates a training program in cooperation with the University of Alaska Southeast, Central Council of Tlingit and Haida Indian Tribes of Alaska, Alaska Department of Labor, Organized Village of Kake, and various local labor organizations. At the present time, Coeur and its contractors are employing more than 300 workers, more than 70 percent of whom are Alaska residents and many of whom are Alaska Natives referred through the training programs supported by Coeur. When the activity of Native owned or affiliated companies is added to direct employment by Coeur and its principal contractors, I estimated that roughly 75 Alaska Natives have found good paying jobs in connection with Kensington Mine construction. These jobs would be lost with serious economic and social repercussions throughout the Native communities of Southeast Alaska if the Court were to grant the injunction requested by Appellants.

22. In addition to employment of individual Natives, the Coeur/BBC Memorandum of Understanding commits Coeur to bidding preferences to Consortium members and affiliated entities. Goldbelt, through a wholly owned subsidiary, is providing security at the mine site, employing six Native shareholders and generating roughly $1 million per year in gross revenues. Goldbelt also leases trucks to Coeur for $2,700 per month. These trucks would have be sold to pay bank loans if they cannot be used at the Kensington Mine site. At present, five Alaska Native owned companies or their affiliates have contracts for work at the Kensington Mine. A partial

listing of some of the benefits of this relationship is set forth in paragraph 12 of the attached Declaration of Duff W. Mitchell. This unprecedented flow of economic benefits to Juneau area Tlingit will come to an abrupt halt if the Court issues the injunction requested by the Appellants.

23. No other company, to my knowledge, has ever worked so conscientiously as Coeur to involve the Natives of northern Southeast Alaska in the planning of its activities, or been so diligent in its efforts to ensure that Alaska Natives are included in the economic benefits to be derived from its operations. An injunction pending appeal would cause enormous economic harm to many individual Natives who are employed or in training to be employed at the Kensington and to the Urban/Village Corporations that form BBC, which are benefiting or hope to benefit from mine-related contracts.

ISSUANCE OF AN INJUNCTION PENDING APPEAL WOULD HAVE A DEVASTATING IMPACT ON THE CITY AND BOROUGH OF JUNEAU AND SURROUNDING COMMUNITIES

24. The Southeast region generally has been hard hit by the loss of timber and fishing related jobs. The population of the region is declining, especially among the economically significant segment between 25 and 35 years of age. The only hope for slowing and reversing this exodus is the creation of new jobs in the private sector that pay a living wage, such as employment constructing and operating the Kensington Mine.

25. Juneau's population has leveled off, its school population (the key determinant of state funding) is declining. Real (inflation adjusted) per capita

and personal income have declined by 5% and 3% respectively since 2001.[3]

26. Juneau has suffered from the transfer of high paying government jobs to other areas of the state and a decline in government job creation. The Juneau economy is periodically staggered by efforts to relocate the State Capital, and for years has been trying to diversify its economic and employment base to make up for lost government jobs. Job creation in recent years has been primarily in the tourism and retail sectors, which are typically seasonal, low paying, and frequently without benefits. Coeur has a strong commitment to hiring locally. The Kensington would be the second largest private employer in the region, and one of the few new sources of full time employment at a living wage with benefits.

27. The present economic impact of activity at the Kensington Mine is significant, with more than 300 workers, most of them hired locally. Once in operation, the mine is expected to provide approximately 225 high paying jobs with an estimated annual payroll of $16 million. This activity has a significant multiplier effect throughout the community, creating an additional estimated 500 indirect and induced jobs, as described in the socio-economic impact analysis performed as part of the project EIS.

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[3] This information was provided to the CBJ Assembly and citizens of Juneau by the Juneau Economic Development Council in a July 2006 report, available on line at www.jedc.org/indicators.htm.

28. In recent years, Juneau has had to hold the line, and in some instances, to decrease its funding for services and community programs. CBJ has already accounted for the anticipated property and sales taxes from the mine in its budget projections.

29. Were the Court to enjoin further mine related activity pending appeal, Juneau would suffer an immediate rise in local unemployment and a drop in associated economic activity, with an attendant reduction in tax revenues and rise in demand for services.

30. In a recent survey provided to the CBJ by the Juneau Economic Development Council 76% of Juneau residents identified the Kensington Mine as important or very important to Juneau's economic future (second only to improved ferry service). All Southeast Alaska businesses surveyed responded that the Mine is important or very important to their economic future.[4]

31. For all the foregoing reasons, an injunction pending appeal of this Court's decision would result in irreparable harm to Goldbelt, its Tlingit Indian shareholders, the community of Juneau, and all of northern Southeast Alaska. The Court should not disrupt the ongoing economic and employment activity generated by the Kensington Mine, especially since the District Court has ruled that plaintiff's claims are without merit.

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[4] The survey is available on line at www.jedc.org/indicators.htm.

DATED this 15th day of August, 2006, at Juneau, Alaska.

/s/Randy Wanamaker
Randy Wanamaker

APPENDIX W

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTHEAST ALASKA CONSERVATION COUNCIL; et al., Plaintiffs-Appellants, v. UNITED STATES ARMY CORPS OF ENGINEERS; et al., Defendants-Appellees, COEUR ALASKA, INC.; et al., Defendant-Intervenors-Appellees.	No. 06-35679 D.C. No. CV-05-0012-J-JKS District of Alaska, Juneau ORDER

Before: GOODWIN and REINHARDT, Circuit Judges.

Appellants' motions to file an over-length motion and over-length reply are granted. The Clerk shall file the emergency motion for an injunction pending appeal and the reply in support of that motion received herein on August 10, 2006 and August 22, 2006, respectively.

Appellee Coeur Alaska, Inc.'s motion to strike appellants' emergency motion for injunctive relief is denied.

Appellants' motion for an injunction pending appeal is granted, without bond. The U.S. Army Corps of Engineers, the U.S. Forest Service, and Coeur Alaska, Inc. are hereby enjoined from authorizing, allowing, or conducting any further construction activities relating to the use of Lower Slate Lake as a disposal site for mine tailings, including, but not limited to, cutting trees, building roads, clearing vegetation, excavating or filling wetlands, building dams or other structures, diverting streams, or altering the natural water level of Lower Slate Lake or the natural flow of East Fork Slate Creek, until further order of this court.

Nothing in this injunction shall prohibit measures needed to restore stream flows, stabilize soils, or prevent erosion.

Appellants' request for expedited briefing and hearing of this appeal is granted. The opening brief and excerpts of record are due September 12, 2006; the answering brief is due October 3, 2006; and the optional reply brief is due within seven days after service of the answering brief.

This appeal will be calendared before the first available panel in the week of November 13, 2006.

Filed: August 24, 2006

APPENDIX X

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTHEAST ALASKA CONSERVATION COUNCIL; et al., Plaintiffs-Appellants, v. UNITED STATES ARMY CORPS OF ENGINEERS; et al., Defendants-Appellees, COEUR ALASKA, INC.; et al., Defendant-Intervenors-Appellees.	No. 06-35679 D.C. No. CV-05-0012-J-JKS District of Alaska, Juneau ORDER

Before: HUG, TASHIMA, and GRABER, Circuit Judges.

Appellee Coeur Alaska, Inc.'s Urgent Motion Under Circuit Rule 27-3(b) to Vacate the Injunction Pending Appeal is denied. The court granted Appellant Southeast Alaska Conservation Council's ("SEACC") Emergency Motion Under Circuit Rule 27-3 on August 24, 2006, at which time the court issued an injunction pending appeal. The court's order

enjoined Coeur Alaska, the U.S. Army Corps of Engineers ("Corps"), and the U.S. Forest Service from activities relating to the construction of a disposal facility at Lower Slate Lake. On November 7, 2006, Coeur Alaska filed its motion to vacate the injunction due to weather conditions and in light of the U.S. Supreme Court's recent decision in *Purcell v. Gonzalez*, 127 S. Ct. 5 (2006).

We conclude that Coeur Alaska's challenge to the injunction, to the extent that it is based on *Purcell*, is untimely. *See* 9th Cir. R. 27-10(a). Even if the form of the injunction were subject to challenge now, we conclude that *Purcell* does not require the court to vacate its injunction. Thus, we confirm issuance of the injunction until the court decides the merits of this case and the mandate issues.

In *Purcell*, the Supreme Court vacated a "bare order" issued by this court that conflicted with a district court's later factual findings. *Id.* at 7–8. In that case, the Supreme Court stated that this court had failed "to provide any factual findings or indeed any reasoning of its own." *Id.* at 8. Coeur Alaska's remedy for failure of the injunction to meet *Purcell's* specificity requirement was, as was done in *Purcell* itself, to petition to the Supreme Court for *certiorari* relief, which Ceour Alaska did not do. Moreover, the Supreme Court gave no indication that this court could not have corrected the situation by offering a justification for its injunction at a later point: Accordingly, even if the court's injunction in this case was insufficient in its level of detail, we will remedy that lack of detail by explaining our reasons for granting the injunction.

An injunction pending appeal is appropriate in this case. In deciding whether to grant an injunction

pending appeal, the court "'balances the plaintiff's likelihood of success against the relative hardship to the parties.'" *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 415 F.3d 1078, 1092 (9th Cir. 2005) (quoting *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003)). This court has recognized two different sets of criteria for preliminary injunctive relief. Under the "traditional test," the moving party must show: "'(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to the plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases).'" *Id.* (quoting *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2005)). The "alternative test" requires that the moving party demonstrate "'*either* a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor.'" *Id.* (quoting 408 F.3d at 1120). As this court has explained many times, "'[t]hese two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. They are not separate tests but rather outer reaches of a single continuum.'" *Id.* at 1092–93 (quoting 408 F.3d at 1120).

Applying this test, SEACC has demonstrated the need for an injunction pending appeal. First, SEACC has shown a likelihood of success on the merits because it has argued persuasively that the Corps' permit to Coeur Alaska violates the Clean Water Act. Second, SEACC has demonstrated that construction of a permanent dam at Lower Slake Lake will ad-

versely affect the environment by destroying trees and other vegetation, and by killing aquatic life. Coeur Alaska has not disputed these facts. Ongoing harm to the environment constitutes irreparable harm warranting an injunction. *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). When a project "'may significantly degrade some human environmental factor,' injunctive relief is appropriate." *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 737 (9th Cir. 2001) (quoting *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 732 (9th Cir. 1995)). Third, the balance of hardships favors SEACC. Coeur Alaska admitted to this court in its brief in response to SEACC's emergency motion for an injunction pending appeal that disposal of tailings into Lower Slate Lake is not scheduled to begin until, at the earliest, next spring. Consequently, construction activities need not begin immediately. Furthermore, as discussed below, the court's injunction allows Coeur Alaska to implement measures necessary to stabilize the coffer darn. Given the risk of irreparable harm to the environment, the balance of hardships tips decidedly in SEACC's favor. Finally, the public interest strongly favors preventing environmental harm. Although the public has an economic interest in the mine, there is no reason to believe that the delay in construction activities caused by the court's injunction will reduce significantly any future economic benefit that may result from the mine's operation. Therefore, applying the court's sliding scale to the record, we conclude that an injunction pending appeal is appropriate in this case.

Our determination concerning the relative hardships does not conflict with that of the district court. When considering SEACC's motion for accelerated

briefing to the district court relating to its motion for an injunction pending appeal, the district court stated that an expedited consideration of SEACC's motion for an injunction pending appeal was not warranted because no additional harm would occur if the court followed a normal briefing schedule. The district court did not actually consider the merits of SEACC's motion. In fact, the district court expressly did not address the balance of hardships. Thus, the district court's order merely addressed timing of briefing to the district court and did not make findings relevant to irreparable harm. SEACC's motion to the district court for an injunction pending appeal was withdrawn when this court granted SEACC's motion for an injunction pending appeal, and thus no findings on the merits were made.

To justify vacating the injunction (other than on the failure to comply with *Purcell's* specificity requirement), Coeur Alaska must demonstrate that facts have changed sufficiently since the court issued its order. *See Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000). Coeur Alaska argued in its motion that the court's injunction prevents it from taking measures to prevent environmental degradation. According to Coeur Alaska, excessive precipitation this autumn has jeopardized the integrity of a coffer dam constructed at the lake's outfall point, which could increase sediment levels in downstream waters. But the court's order granting SEACC's motion for an injunction pending appeal allows Coeur Alaska to take the steps necessary to prevent the alleged environmental harm. The court's order states: "Nothing in this injunction shall prohibit measures needed to restore stream flows, stabilize soils, or prevent erosion." Accordingly, the injunction permits Coeur Alaska to take measures necessary to

stabilize the coffer dam. Assuming Coeur Alaska's factual assertions to be true, Coeur Alaska has failed to demonstrate that construction of a permanent dam is the only measure capable of averting environmental harm. For example, Coeur Alaska could take several lesser measures to prevent breaching of the coffer dam, including installation of a spillway, or removal or reduction in height of the coffer dam itself. The court's order permits Coeur Alaska to take those measures. Thus, Coeur Alaska has not met its burden to show that the injunction should be vacated.

For these reasons, Coeur Alaska's urgent motion to vacate the injunction pending appeal is denied. The court directs all parties, including the government, to meet and consider how best to address the threat posed by weather conditions to the integrity of the coffer dam.

Filed: December 8, 2006

APPENDIX Y

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

No. 06-35679.

SOUTHEAST ALASKA CONSERVATION COUNCIL; Sierra Club; Lynn Canal Conservation,

Plaintiffs-Appellants,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; Timothy J. Gallagher, Colonel, in his official capacity as District Engineer; Larry L. Reeder, in his official capacity as Chief of the Regulatory Branch; Dominic Izzo, in is official capacity as Principal Deputy Assistant Secretary of the Army (Civil Works); United States Forest Service,

Defendants-Appellees,

Coeur Alaska, Inc.; Goldbelt, Inc.; State of Alaska,

Defendants-Intervenors-Appellees.

Argued and Submitted Dec. 4, 2006.
Filed May 22, 2007.

* * * *

Thomas S. Waldo and Demian A. Schane, Earthjustice, Juneau, AK, for plaintiffs-appellants. John T. Stahr and Mark A. Nitczynski, U.S. Department of Justice, Environment & Natural Resources Division, Washington, D.C., for defendants-appellees.

David J. Burman and Robert A. Maynard, Perkins Coie LLP, Boise, Idaho; John C. Berghoff, Jr., and Michael P. Rissman, Mayer Brown Rowe & Maw LLP, Chicago, IL; Cameron M. Leonard, State of Alaska, Department of Law, Fairbanks, AK; and David C. Crosby, David C. Crosby PC, Juneau, AK, for defendants-intervenors-appellees.

Melissa Powers and Allison LaPlante, Pacific Environmental Advocacy Center, Portland, OR; Joseph M. Lovett, Appalachian Center for the Economy & the Environment, Lewisburg, WV; and Peter Van Tuyn, Bessenyey & Van Tuyn, Anchorage, AK, for amici curiae in support of plaintiffs-appellants.

John W. Hartle, City and Borough of Juneau, Juneau, AK; Amy Gurton Mead, Robertson, Monagle & Eastaugh, Juneau, Alaska; Steven J. Lechner, Mountain States Legal Foundation, Lakewood, CO; Michael R. Shebelskie, Hunton & Williams LLP, Richmond, Virginia; Harold P. Quinn, Jr., National Mining Association, Washington, D.C.; and Stephen F. Sorensen, Simpson, Tillinghast & Sorensen PC, Juneau, AK, for amici curiae in support of defendants-appellees.

Appeal from the United States District Court for the District of Alaska; James K. Singleton, Senior District Judge, Presiding. D.C. No. CV-05-00012-J-JKS.

Before PROCTER HUG, JR., A. WALLACE TASHIMA, and SUSAN P. GRABER, Circuit Judges.

HUG, Circuit Judge.

This case presents the question of whether the issuance of a permit by the U.S. Army Corps of Engineers violates the Clean Water Act.[1] The permit issued in this case authorizes Coeur Alaska, Inc., to discharge process wastewater containing tailings from its gold mine into a lake that is a navigable water of the United States. Coeur Alaska proposes to discharge daily 210,000 gallons of process wastewater containing 1,440 tons of tailings from its mine into Lower Slate Lake. The tailings in the discharge will raise the bottom elevation of the lake by 50 feet. A 90-foot high, 500-foot long dam will be built to contain the discharge and the area of the lake will be increased about three-fold. The U.S. Army Corps of Engineers contends that the permit was properly granted under § 404 of the Clean Water Act, which relates to the disposal of "fill material," and that it is not subject to the effluent restrictions of § 301 or § 306 of the Clean Water Act. The plaintiffs contend that this mine disposal discharge must comply with the effluent restrictions of § 301 and § 306, and that any permit allowing discharge must be issued by the Environmental Protection Agency. The district court held that the issuance of the permit was proper. We reverse and remand with instructions to vacate the permit.[2]

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[1] 33 U.S.C. §§ 1251–1387.

[2] We also vacate the permit granted to Goldbelt, Inc., to construct the Cascade Point Marine Facility in Berners Bay and the U.S. Forest Service's Record of Decision approving the general plan because they are dependent on

[Footnote continued on next page]

I.

Coeur Alaska intends to open the Kensington Gold Mine on the site of a prior mine in southeast Alaska that operated from 1897 to 1928. Although the mining operation will include several above-ground facilities, the mine itself will be entirely subterranean.

To process the gold ore retrieved from the mine, Coeur Alaska will construct a froth-flotation mill facility. In the froth-flotation process, ore-bearing rock from the mine will be transported to a mill and moved through a series of mechanical crushing and grinding procedures. After the rock is finely ground, it will be fed into a tank where water and chemicals referred to as conditioners, frothers, surfactants, and scale inhibitors will be added. Air is then pumped into the tank, producing bubbles that attach to the gold deposits. The bubbles rise, bringing the gold with them and forming a froth that is skimmed off the top.

After the gold has bubbled up to the surface and the froth is removed, the tailings—residual ground rock—remain as a waste product. Of the 2,000 tons of ore that the Kensington mine will process each day, only about 100 tons (5 percent) contain economically viable gold minerals. About 40 percent of the tailings will be used as backfill in the mine. The remaining volume is, according to Coeur Alaska, too large to transport off site and presents a waste disposal problem. This dispute arises from Coeur

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the validity of the permit issued by the U.S. Army Corps of Engineers to Coeur Alaska.

Alaska's current plan for addressing that disposal problem.

Coeur Alaska's earlier plan of operations for the Kensington Gold Mine called for the construction of a "dry tailings facility," in which the mine would dispose of waste from its froth-flotation mill on dry "uplands." This disposal process involved the construction of berm and drainage structures around the designated disposal area, dewatering the process wastewater, and placement of the tailings within an enclosure. After the closure of the mine in about 10 to 15 years, Coeur Alaska would have been required to cover the disposal area with native material to support revegetation. The U.S. Forest Service ("Forest Service") approved the plan of operations for the dry tailings facility, and the U.S. Army Corps of Engineers ("Corps") and the Environmental Protection Agency ("EPA") issued permits to the company authorizing the construction of this facility in 1997. The price of gold subsequently dropped to $400 an ounce, however, prompting Coeur Alaska to investigate less expensive ways to develop the mine project.[3] In 2004, Coeur Alaska proposed a new plan of operations with significant amendments. The most important change for our purposes was that, instead of the dry tailings facility, Coeur Alaska proposed to discharge its process wastewater containing the tailings directly into nearby Lower Slate Lake.

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[3] The price of gold has since been rising steadily and is currently over $680 an ounce, thus the original motivation for the change in waste disposal from the mine no longer exists.

Lower Slate Lake, a 23-acre subalpine lake in the Tongass National Forest, is one of several small lakes in the vicinity of the mine. The lake is a fish and wildlife habitat and supports about 1,000 Dolly Varden Char (a freshwater fish) and other native fish and aquatic life. The lake is also a tributary of Slate Creek and drains into Berners Bay.

Coeur Alaska's current disposal plan involves piping approximately 210,000 gallons of process wastewater, including 1,440 tons of tailings, each day to the bottom of Lower Slate Lake in the form of a slurry. This slurry would consist of about 45 percent water and 55 percent tailings. A polymer and flocculent would be added to the slurry to enhance settling of the tailings. Over the 10- to 15-year life of the mine, approximately 4.5 million tons of tailings would be deposited into the lake. The discharge ultimately would raise the bottom of the lake 50 feet, to its current high water mark, and nearly triple its surface area. Coeur Alaska and the Corps admit that the discharge and settling of the tailings into the lake would kill all the fish and nearly all the aquatic life. The effluent would have a pH factor of over 10, which is considerably higher than the lake's current pH factor, and would contain concentrations of several potentially hazardous materials, including aluminum, copper, lead, and mercury. The toxicity of the discharge may have lasting effects on the lake and may negatively affect its ability to sustain aquatic life in the future. The Corps intends that aquatic life would be reintroduced into the lake, but the extent to which aquatic life could be restored eventually is unclear.

To prepare the lake for use as a wastewater disposal facility and the consequent expansion of the lake's

surface, Coeur Alaska would construct a 90-foot high, 500-foot long dam at the lake's outfall point. Coeur Alaska's long-term plan to use the lake as a disposal facility also includes the construction of a diversion ditch. Constructing the ditch would require cutting trees on 7.6 acres of forested land, building a 30-foot wide road, excavating and digging a 3,000-foot ditch, and filling in 4.3 acres of nearby wetlands with 28,800 cubic yards of fill material. In addition, during the 10- to 15-year period of the lake's use as a disposal facility, Slate Creek would be diverted around the lake through a pipeline.

The Forest Service approved Coeur Alaska's current plan of operations at the Kensington Gold Mine, including the revised disposal plan, in a Record of Decision ("ROD") on December 9, 2004. Because the proposed discharge would have the effect of raising the bottom elevation of Lower Slate Lake, the Corps reasoned that the permit program under § 404 of the Clean Water Act, rather than § 402, applies to Coeur Alaska's planned discharges. Accordingly, the Corps issued a permit for the discharge into Lower Slate Lake on June 17, 2005.

Under the permit, when operations at the mine eventually cease, the Corps would require Coeur Alaska to mitigate the environmental impacts at the lake by installing a cap of native material over the tailings at the bottom of the lake. The Corps would also require Coeur Alaska to reintroduce native fish species into the lake and monitor the health of the ecosystem.

II.

Southeast Alaska Conservation Council, the Sierra Club, and Lynn Canal Conservation (collectively "SEACC") filed this lawsuit challenging the Corps' permit and the Forest Service's ROD approving the

general plan on the grounds that they violate § 301(a), § 301(e), and § 306(e) of the Clean Water Act. The crux of SEACC's argument is that the Corps violated the Clean Water Act by issuing a permit for the discharge of process wastewater from a froth-flotation mill into a body of water protected by the Clean Water Act.

After the complaint was filed, the Corps decided to suspend the permit and reconsidered its decision to issue the permit. For that purpose, the Corps moved for voluntary remand of the case before briefing on the merits began, which the district court granted on November 14, 2005. The Corps reinstated the original permit, without changes, on March 29, 2006. At the same time, the Corps issued a revised ROD in which it explained its rationale. SEACC then filed an amended complaint, in which it reiterated its allegations and reasserted its causes of action. Coeur Alaska, Goldbelt, Inc., and the State of Alaska intervened as defendants. The parties filed cross-motions for summary judgment.

The district court granted summary judgment to the defendants on August 4, 2006. In its opinion, the district court focused on whether the Corps misapplied § 404 of the Clean Water Act. The district court noted that SEACC challenged the granting of the permit on the grounds that it did not comply with § 301(e) and § 306(e). It held that if the permit was issued under § 404 for the disposal of "fill material," then § 301(e) and § 306(e) were inapplicable.

SEACC appealed on August 7, 2006, three days after the district court's decision, and this court, on SEACC's motion, granted an injunction pending appeal on August 24, 2006, which prohibited Coeur Alaska, the Corps, and the Forest Service from pro-

ceeding with further construction activities related to preparing the lake for use as a waste disposal site. *See SEACC v. U.S. Army Corps of Eng'rs*, 472 F.3d 1097, 1099 (9th Cir. 2006). Since granting the injunction, we have addressed two emergency motions related to stabilizing a temporary coffer dam that was hastily constructed by Coeur Alaska prior to the injunction. *Id.*; *SEACC v. U.S. Army Corps of Eng'rs*, 479 F.3d 1148, 1151–52 (9th Cir. 2007).

III.

We review the district court's grant of summary judgment de novo and must determine whether the district court correctly applied the relevant substantive law. *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 973 (9th Cir. 2003); *United States v. City of Tacoma*, 332 F.3d 574, 578 (9th Cir. 2003). "De novo review of a district court judgment concerning a decision of an administrative agency means the court views the case from the same position as the district court." *Turtle Island*, 340 F.3d at 973 (citing *Nev. Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993)). Judicial review of administrative decisions under the Clean Water Act is governed by § 706 of the Administrative Procedure Act ("APA"). *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 1170 (9th Cir. 2004). Under the APA, a court may set aside an agency action if the court determines that the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Turtle Island*, 340 F.3d at 973.

IV.

Two different regulations contain plain language interpreting the Clean Water Act that would appear to govern Coeur Alaska's proposed plan of operations at

the Kensington Gold Mine, but they result in different interpretations of the Act. The discharge of wastewater containing tailings from Coeur Alaska's froth-flotation mill operation facially meets the Corps' current regulatory definition of "fill material" because it would have the effect of raising the bottom elevation of the lake. *See* 33 C.F.R. § 323.2(e). Accordingly, under this interpretation, the discharge would be subject to the permit process governed by § 404 of the Clean Water Act. However, EPA previously promulgated a performance standard, pursuant to § 301 and § 306 of the Clean Water Act, that prohibits discharges from froth-flotation mills into waters of the United States. *See* 40 C.F.R. § 440.104(b)(1).

Both of the regulations appear to apply in this case, yet they are at odds. As explained below, the plain language of the Clean Water Act resolves this conflict and requires that the performance standard controls. The statute is unambiguous on this point, and the performance standard applies to discharges from the froth-flotation mill at Coeur Alaska's Kensington Gold Mine into Lower Slate Lake. Furthermore, the federal agencies' clear statements at the time they adopted the current regulatory definition of the term "fill material" demonstrate that they did not intend for waste products subject to effluent limitations and performance standards to be regulated as "fill material." For these reasons the Corps should not have issued a permit to Coeur Alaska under § 404. The district court's grant of summary judgment in favor of the Corps is reversed, and we remand for summary judgment to be entered in favor of the plaintiffs with directions to vacate the permit granted by the Corps.

A.

We begin, as we must, with the text of the Clean Water Act itself to determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843 n.9, 104 S. Ct. 2778.

1.

Congress passed the Clean Water Act in 1972 "to restore and maintain the chemical, physical, and biological integrity" of the waters of the United States. 33 U.S.C. § 1251(a). To achieve this objective, the Clean Water Act sought to eliminate completely the discharge of all pollutants into the nation's navigable waters by 1985. 33 U.S.C. § 1251(a)(1). It also sought to make those waters suitable for fish, shellfish, wildlife, and recreation. 33 U.S.C. § 1251(a)(2). One of Congress's principal concerns in passing the Clean Water Act was the use of water for waste disposal, which Congress deemed "unacceptable." *See* S. Rep. No. 92-414, at 7 (1971), *reprinted in* 1971 U.S.C.C.A.N. 3668, 3674 ("The use of any river, lake, stream or ocean as a waste treatment system is unacceptable."), *quoted in Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1043 (9th Cir. 1978).

The "cornerstone" and "fundamental premise" of the Clean Water Act is § 301, which prohibits all discharges of any pollutant except in compliance with

specified provisions of the statute. *Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1009 (9th Cir. 2002); *Natural Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 109 (D.C. Cir. 1987). Specifically, § 301(a) provides that "the discharge of any pollutant by any person shall be unlawful" except when the discharge complies with the requirements of, *inter alia*, § 301, § 306, § 402, *and* § 404.[4] 33 U.S.C. § 1311(a). In furtherance of this mandate, § 301(b) requires EPA to adopt increasingly stringent, technology-based effluent limitations[5] for point sources.[6] Once an effluent limitation is promulgated, § 301(e) requires that it "shall be applied to *all* point sources of discharge of pollutants in accordance with the provisions of" the statute. 33 U.S.C. § 1311(e) (emphasis added).

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[4] The full text of § 301 states: "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a).

[5] "The term 'effluent limitation' means any restriction established by a State or the [EPA] on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, ... including schedules of compliance." 33 U.S.C. § 1362(11).

[6] "The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

Similarly, § 306 requires EPA to implement even more stringent "standards of performance" for new sources such as the new Coeur Alaska mine project.[7] 33 U.S.C. § 1316(b). To carry out § 306's directive, EPA must promulgate a list of categories of sources and, for new sources within each category, establish a national standard of performance (also referred to as a New Source Performance Standard). *Id.* A standard of performance is defined as "a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which [EPA] determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting *no discharge* of pollutants." 33 U.S.C. § 1316(a)(1) (emphasis added). As with the effluent reductions promulgated under § 301,[8] § 306 states that, once a standard of performance takes effect, "it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of

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[7] "The term 'new source' means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section." 33 U.S.C. § 1316(a)(2).

"The term 'source' means any building, structure, facility, or installation from which there is or may be the discharge of pollutants." 33 U.S.C. § 1316(a)(3).

[8] A standard of performance is one type of effluent limitation. *See* 33 U.S.C. § 1362(11). Therefore, § 301(e) and § 306(e) have the same practical effect in this case.

performance applicable to such source." 33 U.S.C. § 1316(e). Congress thus "intended these regulations to be absolute prohibitions." *E.I. du Pont de Nemours & Co. v. Train* ("*Du Pont*"), 430 U.S. 112, 138, 97 S. Ct. 965, 51 L.Ed.2d 204 (1977) (citing S. Rep. No. 92-414, at 58 (1971)). The legislative history of § 306 indicates that Congress made a "deliberate choice not to allow variances for new sources." *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 192 (2d Cir. 2004). As such, no exceptions to a standard of performance are allowed. *See id.*; *Du Pont*, 430 U.S. at 138, 97 S. Ct. 965.

To ensure compliance with effluent limitations and performance standards established pursuant to § 301 and § 306, Congress created the National Pollutant Discharge Elimination System ("NPDES") permit program under § 402 of the Act. Through the NPDES program, EPA may permit a discharge, but only if it complies with § 301 and § 306. Additionally, NPDES permits are supposed to limit the release of pollutants into waterways as much as possible by imposing numerical discharge restrictions. *Rybachek v. EPA*, 904 F.2d 1276, 1283 (9th Cir. 1990). For this reason, the NPDES permit program is considered "central to the enforcement" of the Clean Water Act. *Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1374 (D.C. Cir. 1977).

In addition to the NPDES permit program, the Clean Water Act established a secondary permit program for the discharge of "dredged or fill material" under § 404. According to § 404, the Corps "may issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). We conclude that the permit scheme under § 404 is a limited permit program that

applies only to dredged or fill material, not to the discharge of pollutants from industrial or municipal sources.

2.

The language of the Clean Water Act is clear on the issue at the center of this dispute. First, § 301(a) prohibits *any* discharge that does not comply with several enumerated sections, including both § 301 and § 306, as well as § 402 and § 404. 33 U.S.C. § 1311(a). The use of "and" as a connector, instead of "or," indicates that Congress intended for effluent limitations and standards of performance to apply to all applicable discharges, even those that facially qualify for permitting under § 404. Second, § 301(e) applies effluent limitations established by EPA to *all* discharges. 33 U.S.C. § 1311(e). Third, § 306(e) prohibits *any* discharge that does not comply with performance standards promulgated by EPA. 33 U.S.C. § 1316(e). In clear and precise terms, § 301 and § 306 require that discharges comply with applicable effluent limitations and standards of performance. Neither § 301 nor § 306 contains an exception for discharges that would otherwise qualify for regulation under § 404. Rather, § 301 and § 306 are "absolute prohibitions" with no exceptions. *Du Pont*, 430 U.S. at 138, 97 S. Ct. 965.

Nevertheless, the defendants argue that § 301 and § 306 do not apply to § 404 permits because § 402 explicitly requires compliance with those sections whereas § 404 does not. The defendants then reason, by way of negative inference, that § 404 contains an implied exception to the requirements of § 301 and § 306 whenever a proposed discharge would meet the agencies' regulatory definition of "fill material." We disagree. Negative inferences and implied exceptions

are generally disfavored. As the Supreme Court stated in *United States v. Rutherford*, 442 U.S. 544, 99 S. Ct. 2470, 61 L.Ed.2d 68 (1979): "Exceptions to clearly delineated statutes will be implied only where essential to prevent 'absurd results' or consequences obviously at variance with the policy of the enactment as a whole." *Id.* at 552, 99 S. Ct. 2470 (citing *Helvering v. Hammel*, 311 U.S. 504, 510–11, 61 S. Ct. 368, 85 L.Ed. 303 (1941)). That is because courts have "generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" of particular language. *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, --- U.S. ----, 126 S. Ct. 1843, 1852, 164 L.Ed.2d 625 (2006) (quoting *Bates v. United States,* 522 U.S. 23, 29–30, 118 S. Ct. 285, 139 L.Ed.2d 215 (1997)). The defendants have produced no compelling reason to believe that Congress intended an exception within § 404 that it did not explicitly create. If the defendants' interpretation were correct, Congress would have written § 301 and § 306 within § 402, not as separate sections. Moreover, the implied exception urged by the defendants, if adopted, would turn § 404 into an exception that swallows the rule created by § 301, § 306, and § 402 by allowing the Corps to use a negative inference from an exception clause within § 402. Thus, § 404's silence regarding the explicit and detailed requirements in § 301 and § 306 cannot create an exception to those sections' strongly-worded blanket prohibitions.

The defendants' interpretation would render § 301(e) and § 306(e) effectively meaningless. Courts strive to avoid interpreting a statute "in a manner that renders other provisions of the same statute inconsistent, meaningless, or superfluous." *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir.

1991), *quoted in Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1024 (9th Cir. 2005); *see also Ratzlaf v. United States*, 510 U.S. 135, 140–41, 114 S. Ct. 655, 126 L.Ed.2d 615 (1994); *Watt v. Alaska*, 451 U.S. 259, 267, 101 S. Ct. 1673, 68 L.Ed.2d 80 (1981) ("We must read the statutes to give effect to each if we can do so while preserving their sense and purpose."). If the defendants were correct, the words "all" in § 301(e) and "any" in § 306(e)[9] would lose their meaning entirely.

There is a much simpler explanation for the difference in language between § 402 and § 404 than the defendants' proposed negative inference. If EPA has adopted an effluent limitation or performance standard applicable to a relevant source of pollution, § 301 and § 306 preclude the use of a § 404 permit scheme for that discharge. *See* 67 Fed. Reg. 31,129, 31,135 (May 9, 2002); EPA/Corps, Joint Response to Comments 12 (May 3, 2002). Accordingly, the NPDES program administered by EPA under § 402 is the only appropriate permitting mechanism for

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[9] Section 301(e) provides: "Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to *all* point sources of discharge of pollutants in accordance with the provisions of this chapter." 33 U.S.C. § 1311(e) (emphasis added).

Section 306(e), which applies to new sources like the Coeur Alaska mine project, provides: "After the effective date of standards of performance promulgated under this section, it shall be unlawful for *any* owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source." 33 U.S.C. § 1316 (emphasis added).

discharges subject to an effluent limitation under § 301 or a standard of performance under § 306. Consequently, there was simply no need for Congress to enumerate § 301 or § 306 within § 404 because Congress never intended for § 404 to govern discharges subject to effluent limitations or performance standards. Rather, when a discharge is subject to an effluent limitation or performance standard, that discharge must comply with the NPDES program as required by § 402. *See* 67 Fed. Reg. at 31,135; 47 Fed. Reg. 54,598, 54,606 (Dec. 12, 1982). This construction of the statute preserves the full meaning of all of its provisions without rendering any provision superfluous or resorting to negative inferences and implied exceptions.

Additionally, although § 404 does not contain an explicit exception to effluent limitations or standards of performance, it does contain exceptions to other provisions of the Clean Water Act. Specifically, § 404(f) exempts discharges of dredged or fill material from certain activities from regulation under § 301(a), § 402, and § 404. 33 U.S.C. § 1344(f)(1). Discharges related to agricultural activities and road construction, among others, are exempted under § 404(f)(1). Mining is not listed as an exempt activity. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17, 100 S. Ct. 1905, 64 L.Ed.2d 548 (1980). The defendants have produced no reason to believe that Congress intended additional exemptions to be created later. Therefore, the lack of any explicit exception to § 301 and § 306 within § 404, and the lack of an exception for process wastewater from mines, is strong evidence that Congress did not

intend one. *Id.* Even stronger evidence is Congress's insistence in § 404(f) that even the discharges from the enumerated activities continue to be subject to effluent standards. 33 U.S.C. § 1344(f).

Thus, the plain language of the Clean Water Act directly resolves the conflict between the regulatory definition of "fill material" and EPA's performance standard for froth-flotation mill operations. Pursuant to § 301 and § 306, EPA's performance standard for froth-flotation mills governs this situation. The language of § 404 does not lead to a contrary conclusion.

B.

Although the plain language of the Clean Water Act resolves the apparent regulatory conflict at the heart of this case, the regulatory history further demonstrates that neither the Corps nor EPA intended for the current regulatory definition of "fill material" to replace the performance standard for froth-flotation mills. Courts consider contemporaneous explanations of regulations, such as those published in the Federal Register through notice-and-comment rulemaking, in order to determine an agency's intent. *See Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 714–16, 105 S. Ct. 2371, 85 L.Ed.2d 714 (1985); *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 797 (9th Cir. 2003); *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1189–90 (9th Cir. 2002); *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 446–47 (4th Cir. 2003). And courts will not defer to an agency's interpretation of a regulation that contradicts the agency's intent at the time it promulgated the regulation. *Gonzales v. Oregon*, 546 U.S. 243, 126 S. Ct. 904, 916, 163 L.Ed.2d 748 (2006);

Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512, 114 S. Ct. 2381, 129 L.Ed.2d 405 (1994); *Alaska Trojan P'ship v. Gutierrez*, 425 F.3d 620, 627–28 (9th Cir. 2005); *see also Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L.Ed.2d 79 (1997) (an agency's interpretation of a regulation is not entitled to deference where it is "plainly erroneous" or "inconsistent with the regulation") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S. Ct. 1215, 89 L.Ed. 1700 (1945)). When the agencies promulgated the current definition in 2002, they foresaw and specifically addressed the potential conflict between the effects-based definition of "fill material" and performance standards already in place. To that end, the agencies explicitly stated that wastes subject to performance standards and effluent limitations would not be considered "fill material." The Corps' application of the fill rule in this case, therefore, contradicts its interpretation at the time the regulation was promulgated.

1.

Following its statutory obligation under § 301 and § 306, in 1982 EPA promulgated effluent limitations and standards of performance for sources within the category of ore mining. *See* 47 Fed. Reg. 25,682 (June 14, 1982) (proposed); 47 Fed. Reg. 54,598 (Dec. 3, 1982) (final). Within this category, EPA established a subcategory that applied to gold mining. *See* 40 C.F.R. §§ 440.100–440.104. For gold mines using the froth-flotation mill process, EPA promulgated a zero-discharge standard:

> Except as provided in paragraph (b)[2] of this section, there shall be *no discharge* of process waste-water to navigable waters from mills that use

> the froth-flotation process alone, or in conjunction with other processes, for the beneficiation of copper, lead, zinc, gold, silver, or molybdenum ores or any combination of these ores.

40 C.F.R. § 440.104(b)(1) (emphasis added); *see also* 47 Fed. Reg. at 25,697 (proposing zero discharge). EPA found that the zero-discharge standard was practicable because the majority of facilities existing at the time already achieved zero discharge through recycling and evaporation processes. 47 Fed. Reg. at 54,602. EPA promulgated this standard knowing that process wastewater discharges from froth-flotation mills contain a large amount of suspended solids that could otherwise qualify for regulation under § 404 pursuant to its effects-based definition of "fill material." *See* 47 Fed. Reg. at 25,685 ("Mill process wastewater is characterized by very high suspended solids levels (often in the percent range rather than milligrams per liter) . . . ."). In determining that a strict zero-discharge limit was appropriate, EPA determined that the best available control technology included the complete recycling of process wastewater. *See* 47 Fed. Reg. at 54,602. Given that the regulation facially applies to *any* discharge from a froth-flotation mill, and that it provides some limited exceptions that do not include "fill material," EPA intended for the prohibition to apply to discharges that would otherwise qualify as fill material under § 404. *See* 67 Fed. Reg. at 31,135. This conclusion is also supported by the fact that EPA promulgated the regulation notwithstanding its definition of "fill material," which was identical to the definition used by both agencies today.

2.

The history of the current fill rule also demonstrates that both agencies intended for effluent limitations and performance standards to apply even to discharges that facially meet the definition of the term "fill material." The Clean Water Act does not define the term "fill material." Instead, Congress implicitly left that term to the Corps and EPA to define. *See Res. Invs., Inc. v. U.S. Army Corps of Eng'rs*, 151 F.3d 1162, 1166 (9th Cir. 1998). As with most regulatory definitions, the agencies' definitions of "fill material" have evolved over time. In fact, prior to the current regulatory definition of "fill material," the Corps and EPA defined "fill material" differently. The Corps initially used an effects-based test, which defined "fill material" as "any pollutant used to create fill in the traditional sense of replacing an aquatic area with dry land or of changing the bottom elevation of a water body for any purpose." 40 Fed. Reg. 31,320, 31,325 (July 25, 1975). EPA later adopted the identical definition. 40 Fed. Reg. 41,292, 41,298 (Sept. 5, 1975). Two years later, the Corps revised its definition and adopted a purpose-based test, which excluded from its definition "any pollutant discharged into the water primarily to dispose of waste." 42 Fed. Reg. 37,122, 37,145 (July 19, 1977). In adopting its purpose-based definition, the Corps explained that there were many waste materials "which technically fit within our definition of 'fill material' but which were intended to be regulated under the NPDES program." *Id.* at 37,130. EPA, in 1980, chose to keep its effects-based test. *See* 45 Fed. Reg. 33,290, 33,421 (May 19, 1980).

The agencies' differing definitions of "fill material" created a potential regulatory overlap. *See, e.g., Res.*

Invs., 151 F.3d at 1165–66, 1168–69 (acknowledging overlap); *Kentuckians*, 317 F.3d at 432 ("the Corps acknowledged that the differing approaches in defining 'fill material' employed by EPA and the Corps in their regulations had created some uncertainty about their interpretation of the Clean Water Act"). Many industrial wastes contain a high proportion of suspended solids and, therefore, have the effect of changing the bottom elevation of a body of water. As such, those wastes could have been considered fill material under EPA's definition. However, EPA continued to regulate many of those industrial wastes under § 402, and also continued to promulgate new effluent limitations and standards of performance for industrial pollutants with high concentrations of solids, regardless of their potential to raise the bottom elevation of a body of water. *See, e.g.*, 46 Fed. Reg. 8,260, 8,292 (Jan. 26, 1981) (regulating discharges of suspended solids from log-washing processes). Indeed, the new source performance standard for froth-flotation mills was adopted in 1982, despite the fact that waste from this process would have the effect of raising bottom elevation and, therefore, could otherwise constitute fill material under EPA's effects-based test. *See* 47 Fed. Reg. at 25,685. Thus, notwithstanding the potential regulatory overlap created by the agencies' differing definitions, EPA regulated many industrial pollutants under § 402. The agencies formally adopted this practice in a Memorandum of Agreement on Solid Waste ("MOA") in 1986. 51 Fed. Reg. 8,871 (Mar. 14, 1986). After adoption of the MOA in 1986, the Corps continually declined to exercise jurisdiction over mine tailings.[10]

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[10] *See, e.g.*, Memorandum from Col. John W. Pierce, U.S.

[Footnote continued on next page]

In 2002, the agencies promulgated their joint regulation defining the terms "fill material" and "discharge of fill material." 67 Fed. Reg. at 31,130. The current regulatory definition of "fill material" provides:

> (1) Except as specified in paragraph (e)(3) of this section, the term "fill material" means material placed in waters of the United States where the material has the effect of:
>
> (i) Replacing any portion of a water of the United States with dry land; or
>
> (ii) Changing the bottom elevation of any portion of a water of the United States.
>
> (2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris,

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Army Corps of Eng'rs, "Agency Jurisdiction over Certain Activities Connected with Mineral Extraction, Specifically Gold Mining, in Alaska" 1–2 (Apr. 14, 1992) ("The tailings behind the dam, however, are a waste product of the mining operation and are not under our jurisdiction according to the 1986 Memorandum of Agreement...."); Letter from Glen E. Justis, U.S. Army Corps of Eng'rs 2–3 (June 18, 1991) ("The Corps has neither special expertise [n]or jurisdiction by law to evaluate the impacts of the tailings discharge.... The tailings do not meet the Corps' definition of fill material.").

> wood chips, overburden from mining[11] or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.
>
> (3) The term fill material does not include trash or garbage.

33 C.F.R. § 323.2(e) (Corps' regulation); 40 C.F.R. § 232.2 (EPA's regulation) (emphasis added). The agencies also defined "discharge of fill material" as follows:

> The term "discharge of fill material" means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: . . . placement of overburden, slurry, or tailings or similar mining-related materials . . . .

33 C.F.R. § 323.2(f); 40 C.F.R. § 232.2.[12]

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[11] "Overburden" is generally defined as rock or soil cleared away before mining. *See* EPA, *Terms of Environment*, http://www.epa.gov/OCEPAterms/oterms.html (May 14, 2007).

[12] The *amici* brief of 14 members of Congress argues persuasively that the adoption of these regulations by the Corps and EPA violates the purposes and plain language of the Clean Water Act by allowing waste material to be dumped into lakes, rivers, and other waters of the United States. SEACC bases its argument on a narrower ground pertaining to this particular mine. Thus, we do not reach the issue of the validity of these regulations.

At the same time, however, the agencies made clear that they did not intend to change their long-standing practice, according to which EPA regulates discharges of pollutants for which it has established effluent limitations or standards of performance under the NPDES program.[13]

> [W]e emphasize that today's rule generally is intended to maintain our existing approach to regulating pollutants under either section 402 or 404 of the CWA. Effluent limitation guidelines and new source performance standards ("effluent guidelines") promulgated under section 304[14] and 306 of the CWA establish

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[13] In *Kentuckians*, the Fourth Circuit recognized the Corps' prior practice of not regulating discharges subject to effluent limitations under § 404:

> [W]e conclude that the Corps' interpretation of "fill material" as used in § 404 of the Clean Water Act to mean all material that displaces water or changes the bottom elevation of a water body *except* for "waste"—meaning garbage, sewage, and *effluent that could be regulated by ongoing effluent limitations* as described in § 402—is a permissible construction of § 404.

317 F.3d at 448. The court also explained the Corps' prior position that it was not authorized to regulate discharges subject to effluent limitations. *Id.* at 445.

[14] Sections 304 and 301 are interchangeable in this instance. Section 304 directs EPA in how to determine the degree of effluent reduction attainable under § 301. *Citi-*

[Footnote continued on next page]

limitations and standards for specified wastestreams from industrial categories, and those limitations and standards are incorporated into permits issued under section 402 of the Act. EPA has never sought to regulate fill material under effluent guidelines. Rather, effluent guidelines restrict discharges of pollutants from identified wastestreams based upon the pollutant reduction capabilities of available treatment technologies. Recognizing that some discharges (such as suspended or settleable solids) can have the associated effect, over time, of raising the bottom elevation of a water due to settling of waterborne pollutants, we do not consider such pollutants to be "fill material," and nothing in today's rule changes that view. *Nor does today's rule change any determination we have made regarding discharges that are subject to an effluent limitation guideline and standards, which will continue to be regulated under section 402 of the CWA.* Similarly, this rule does not alter the manner in which water quality standards currently apply under the section 402 or the section 404 programs.

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zens Coal Council v. EPA, 447 F.3d 879, 883 (6th Cir. 2006) (en banc) (citing 33 U.S.C. § 1314).

67 Fed. Reg. at 31,135 (emphasis added). Additionally, in their Joint Response to Comments to the proposed rule, the agencies restated this position:

> Under today's rule, we will continue, consistent with our long-standing practice, to rely on the existence of effluent limitation guidelines or standards or a NPDES permit to inform the determination of how a particular discharge is regulated under the Act. If a specific discharge is regulated under Section 402, it would not also be regulated under Section 404, and vice versa.

EPA/Corps, Joint Response to Comments 30. In the same document, the agencies clarified that the new rule would not expand the jurisdiction of the Corps or permit previously prohibited discharges: "the suggestion that this rulemaking now provides a legal basis for previously illegal activities is not the case- no discharges that were previously prohibited are now authorized as a result of this rulemaking." *Id.* Thus, the agencies clearly intended to exclude discharges subject to effluent limitations or performance standards from the new definition of "fill material."

In fact, when the Corps and EPA first proposed the revised, coordinated definition in 2000, they included an explicit exemption from the definition of "fill material" for discharges subject to effluent limitations or standards of performance. *See* 65 Fed. Reg. 21,292, 21,299 (Apr. 20, 2000). The stated purpose of the exemption was to maintain the agencies' "current practice," which was "consistent with paragraph B.5 of the 1986 Solid Waste MOA." *Id.* at 21,297. Although the agencies removed the explicit exemption

from the final rule, they did so only because commenters expressed concern that the exception was vague and would create uncertainty regarding whether the reference to effluent guidelines applied prospectively or only to those guidelines already in existence at the time. *See* 67 Fed. Reg. at 31,135. As such, the agencies still intended to regulate discharges subject to effluent limitations and standards of performance under § 402.

The defendants attempt to undermine the clear intent of the agencies by focusing on a single sentence of the preamble in which the agencies stated "mining-related material that has the effect of fill when discharged will be regulated as 'fill material.'" *Id.* The district court also relied on that one sentence. However, the defendants and the district court give far more weight to that singular statement than it deserves. It is difficult to understand why the agencies would painstakingly explain in the preamble that the new definition would not change their treatment of discharges subject to effluent limitations and standards of performance, only to completely contradict themselves two paragraphs later. The agencies themselves cleared up any potential confusion in their Joint Response to Comments:

> Today's final rule clarifies that any material that has the effect of fill is regulated under section 404 and further that the placement of "overburden, slurry, or tailings or similar mining-related materials" is considered a discharge of fill material. *Nevertheless, if EPA has previously determined that certain materials are subject to an [effluent limitation guideline] under specific cir-*

> *cumstances, then that determination remains valid.*

EPA/Corps, Joint Response to Comments 12. Thus, the current fill rule only applies to those tailings and other mining-related materials that are not subject to effluent limitations or standards of performance.[15] The agencies could not have been more clear in articulating that this would be their preferred approach.

3.

In fact, the agencies followed that approach with Coeur Alaska for quite some time. The Corps consistently informed Coeur Alaska that discharges from its froth-flotation mill would not be regulated as fill material under § 404. At least, the agencies took that approach up until the time that the Corps granted the permit that led to this dispute. Prior to the promulgation of the current fill rule in 2002, the

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[15] The Fourth Circuit's holding in *Kentuckians* is consistent with our conclusion. In *Kentuckians*, the court addressed the issue of whether the Corps had authority under § 404 to permit valley fills from mountain-top coal mining "when the valley fills serve no purpose other than to dispose of excess overburden from the mining activity." 317 F.3d at 439. EPA had not promulgated a performance standard for mountain-top coal mining, so neither § 301 nor § 306 was implicated in that case. *Id.* at 445. Moreover, in that case, the Corps admitted that, under the 2002 definition, "it was authorized to regulate discharges of fill, even for waste, *unless the fill amounted to effluent that could be subjected to effluent limitations.*" *Id.* (emphasis added).

Corps relied on the 1986 MOA in informing Coeur Alaska that it lacked jurisdiction and expertise to permit discharges of tailings from the Kensington mine as "fill material." For example, in a 1998 ROD, the Corps made clear to Coeur Alaska that it "does not regulate the placement of tailings." U.S. Army Corps of Eng'rs, ROD 13 (Jan. 18, 1998). And as late as 2005, EPA informed Coeur Alaska that "[b]ecause this project would be a new source, the New Source Performance Standards (NSPS) for gold mines and mills are applicable to the project." EPA, ROD for § 402 NPDES Permit 3 (June 28, 2005) (citing 40 C.F.R. § 440.104). Therefore, in addition to the regulatory history, the agencies have an established record of refusing to regulate tailings discharged from Coeur Alaska's planned froth-flotation mill at the Kensington mine as fill material under § 404.

C.

The agencies' unequivocal statements regarding their intent not to override effluent limitations and standards of performance when they promulgated the current fill rule are dispositive and compel the conclusion that the Corps overstepped its authority in issuing a permit to Coeur Alaska under § 404. If the agencies actually did intend to repeal or create an exception to the performance standard for froth-flotation mills when they promulgated the current fill rule, they did not acknowledge or provide a satisfactory explanation for the change in course. When an agency decides to change course by rescinding or changing a rule, the agency "is obligated to supply a reasoned analysis for the change." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 103 S. Ct. 2856, 77 L.Ed.2d 443 (1983). If an agency fails to comply with that obliga-

tion, the new rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and is invalid under § 706(2)(A) of the APA. *Id.* at 41, 103 S. Ct. 2856 (citing 5 U.S.C. § 706(2)(A)); *see also Bush-Quayle 92 Primary Comm., Inc. v. Fed. Election Comm'n*, 104 F.3d 448, 453 (D.C. Cir. 1997). Not only did the Corps and EPA not acknowledge a change in course when they promulgated the fill rule, they actually stated the opposite intent. That is, the agencies made clear that effluent limitations and standards of performance would continue to apply. We could not have interpreted the fill rule as creating an exception to the performance standard for froth-flotation mills without the agencies complying with the APA by explaining their intent in the Federal Register and offering an opportunity for notice and comment. *See Motor Vehicle Mfrs.*, 463 U.S. at 42, 103 S. Ct. 2856.

D.

Finally, the performance standard governs because it is more specific. It is a basic principle of regulatory interpretation that a regulation dealing with a "narrow, precise, and specific subject is not submerged" by a later enacted regulation "covering a more generalized spectrum." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153, 96 S. Ct. 1989, 48 L.Ed.2d 540 (1976), *cited in Cal. ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 215 F.3d 1005, 1013 (9th Cir. 2000). Unlike the fill rule, which pertains to fill material generally, the performance standard covers froth-flotation mills precisely. *See* 40 C.F.R. § 440.104. Consequently, the agencies' later promulgation of the more general fill rule cannot supersede the narrow, precise, and specific performance standard for froth-flotation mills.

E.

The Corps also issued a permit to Goldbelt, Inc., for construction of a marine terminal facility at Cascade Point and issued a ROD approving Goldbelt's plan of operations. *See* U.S. Army Corps of Eng'rs, Permit to Goldbelt, Inc. (July 15, 2005); U.S. Army Corps of Eng'rs, Revised ROD 4 (Mar. 29, 2006). Goldbelt's permit and ROD are predicated on a mine design of which a critical component is Coeur Alaska's discharge of process wastewater into Lower Slate Lake. But for that mine design, the Cascade Point facility would be unnecessary. In fact, the Corps itself stated that "without Kensington mine, the Cascade Point facility would not be constructed in the foreseeable future." U.S. Army Corps of Eng'rs, Revised ROD 4. For that reason, the Corps considered the terminal a "component" of the Kensington project and analyzed the terminal proposal in the same Final Supplemental Environmental Impact Statement and Revised ROD as the Kensington project. *Id.* Indeed, Goldbelt must have had a "significantly protectable interest" relating to the subject of this case in order to intervene as a defendant, which it chose to do. *United States v. City of L.A.*, 288 F.3d 391, 398 (9th Cir. 2002); Fed. R. Civ. P. 24(a)(2). Importantly, in its motion to intervene, the company admitted that "Goldbelt's Cascade Point marine terminal is an integral part of the approved Plan of Operations, and may be constructed and used *solely* to service the Kensington Mine as contemplated in that Plan of Operations." Goldbelt further admitted that "[a]ny ruling by this Court that delays or disrupts construction of the mine will leave Goldbelt with a 'permitted' facility that either it cannot build or cannot be operated once built because the condition precedent of Goldbelt's permits is construction and operation of

the Kensington Mine as contemplated in the challenged Plan of Operations." Consequently, Goldbelt's permit and ROD are critically premised on Coeur Alaska's § 404 permit. Because that permit is invalid, the Corps' permit and ROD for the Cascade Point facility should be vacated.

F.

Under the APA, the normal remedy for an unlawful agency action is to "set aside" the action. 5 U.S.C. § 706(2). In other words, a court should "vacate the agency's action and remand to the agency to act in compliance with its statutory obligations." *Defenders of Wildlife v. EPA*, 420 F.3d 946, 978 (9th Cir. 2005), *cert. granted*, --- U.S. ----, 127 S. Ct. 853, 166 L.Ed.2d 681 (2007); *see also Am. Biosci., Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001). For the reasons discussed above, the Corps' permit for the discharge of process wastewater from the froth-flotation mill at the Kensington Gold Mine into Lower Slate Lake violates § 301 and § 306 of the Clean Water Act. The Corps' permit for construction of a marine terminal at Cascade Point critically depends on the unlawful permit to Coeur Alaska. Consequently, we remand to the district court to vacate both permits, as well as the RODs on which they are based.

V.

In conclusion, we reverse the district court, remand to the district court to vacate the permits issued to Coeur Alaska and Goldbelt, and vacate the RODs that approved Coeur Alaska's and Goldbelt's plans of operations. The Corps violated the Clean Water Act by issuing a permit to Coeur Alaska for discharges of slurry from the froth-flotation mill at the Kensington Gold Mine. EPA's performance standard for froth-flotation mills, promulgated pursuant to § 301 and

§ 306 of the Clean Water Act, prohibits discharges from such operations into the navigable waters of the United States. No exceptions are provided by either the regulation or the statute. Even though the discharge in this case facially qualifies for the permitting scheme under § 404 of the Clean Water Act because it will change the bottom elevation of Lower Slate Lake, the discharge is nevertheless prohibited by the clearly applicable and specific performance standard. The plain language and structure of the Clean Water Act demonstrate that EPA's performance standard governs in this case. Also, the agencies' statements made during promulgation of the regulation defining "fill material," as well as their statements made to Coeur Alaska during the lengthy permitting process, indicate that they intended this result.

Thus, the district court erred in granting summary judgment in favor of the defendants. The case is remanded to the district court for action pursuant to this opinion.

REVERSED and REMANDED.

APPENDIX Z

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTHEAST ALASKA CONSERVATION COUNCIL; et al., Plaintiffs-Appellants, v. UNITED STATES ARMY CORPS OF ENGINEERS; et al., Defendants-Appellees, COEUR ALASKA, INC.; et al., Defendants-Intervenors-Appellees.	No. 06-35679 D.C. No. CV-05-0012-J-JKS District of Alaska, Juneau ORDER

Before: HUG, TASHIMA, and GRABER, Circuit Judges.

The panel has voted to deny the Federal Appellees' Petition for Limited Panel Rehearing.

Judge Graber has voted to deny the petitions for rehearing en banc of Intervenor-Appellee Goldbelt, Inc., Intervenor-Appellee Coeur Alaska, Inc., and Appellee State of Alaska. Judge Hug and Judge Tashima have voted to recommend denial of the petitions for rehearing en banc.

The full court has been advised of the petitions for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petitions for rehearing en banc are DENIED.

Filed: October 29, 2007

APPENDIX AA

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTHEAST ALASKA CONSERVATION COUNCIL; et al., Plaintiffs-Appellants, v. UNITED STATES ARMY CORPS OF ENGINEERS; et al., Defendants-Appellees, COEUR ALASKA, INC.; et al., Defendant-Intervenors-Appellees.	No. 06-35679 D.C. No. CV-05-0012-J-JKS District of Alaska, Juneau ORDER

Before: HUG, TASHIMA, and GRABER, Circuit Judges.

Appellee's motion to stay issuance of the mandate pending the filing and disposition of a petition for a writ of certiorari is GRANTED. The stay shall continue until final disposition by the Supreme Court.

Filed: November 14, 2007

APPENDIX AB

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTHEAST ALASKA CONSERVATION COUNCIL; et al., Plaintiffs-Appellants, v. UNITED STATES ARMY CORPS OF ENGINEERS; et al., Defendants-Appellees, COEUR ALASKA, INC.; et al., Defendant-Intervenors-Appellees.	No. 06-35679 D.C. No. CV-05-0012-J-JKS District of Alaska, Juneau ORDER

Before: HUG, TASHIMA, and GRABER, Circuit Judges.

Our court, having granted the stay of mandate in this case, now grants the suggested alternative in appellants' motion and directs Coeur Alaska, Inc., the Army Corps of Engineers, and the Forest Service to prepare and approve a reclamation plan by no later than April 1, 2008. Any motion for an extension of the deadline must be timely made, indicate whether plaintiffs-appellants oppose or agree to the request, and fully justify any period of extension requested.

Filed: November 26, 2007